Office-Supreme Court, U.S.
FILED
FEB 23 1981
ALEXANDER L. STEVAS,
CLERK

80-1426

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1980

ZEIGLER COAL COMPANY, an Illinois Corporation,
Petitioner,

v.

PHILLIP A. DETHLOFF and
DOROTHY J. DETHLOFF,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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The Scheffer Press, Inc.—(312) 263-6850

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a state court's reversal of prior mining law, with retroactive imposition of punishment for violation of the newly announced ruling and without any consideration of the lessee's reliance on advice of reputable counsel, violates the lessee's constitutional right to fair notice under the Due Process Clause of the Fourteenth Amendment; and

II. Whether a mineral lessee, whose mining activities have been undertaken in good faith reliance on advice of counsel, is denied due process of law when a

state trial court refuses to grant any hearing on the issue of good faith and finds the lessee's trespass to be in bad faith as a matter of law, resulting in massive punitive sanctions.

LIST OF ALL PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties[1] to the proceedings in the court whose judgment is sought to be reviewed.

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[1] Zeigler Coal Company has no subsidiaries or affiliates and is a wholly owned subsidiary of Houston Natural Gas Corporation.

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Illinois is reported at 82 Ill. 2d 393, 412 N.E.2d 526 (1980), (App. 37a-59a). The opinion of the Appellate Court of Illinois for the Fourth Judicial District is reported at 69 Ill. App. 3d 133, 386 N.E.2d 1373 (1979), (App. 1a-36a).

GROUNDS ON WHICH JURISDICTION IS INVOKED

The opinion of the Supreme Court of Illinois was filed October 17, 1980, and a timely Petition for Rehearing was denied November 26, 1980. On December 2, 1980, an order was entered by the Supreme Court of Illinois staying issuance of its mandate until disposition by this Court of Petitioner's Petition for Writ of Certiorari, which is being filed within 90 days of November 26, 1980.

This Court's jurisdiction is invoked under the provisions of 28 U.S.C. § 1257(3) (1976).

CONSTITUTIONAL PROVISION INVOLVED

Petitioner invokes the constitutional guarantees of the Fourteenth Amendment of the United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Respondents filed the instant action to recover alleged damages arising from Petitioner's 1976 mining of coal under land owned by Respondents.

Petitioner's predecessors had executed a Mining Lease with Respondents' predecessors on June 20, 1945. On October 18, 1969, Respondents purchased the land involved herein for $20,000. Underlying Respondents' parcel was a small part of the seam of coal known as the Murdock Mine. Under a comprehensive mine plan for the entire coal seam, accommodating variables including land acquisitions; movement of men, materials, and air through the mine; and other engineering constraints, Respondents' parcel could not be reached until 30 years after the first shaft was sunk, or 1976 (R. 543-60, 809-24). For most of the 30-year period, Respondents' property was an island of coal, not economically retrievable until contiguous parcels could be mined.

Before commencement of mining in 1976, Petitioner sought legal advice respecting this claim and obtained the opinion of reputable counsel, both in-house and independent, that mining in 1976 would not constitute trespass. Respondents sought no injunction restraining mining, and did not file suit for declaratory judgment until June 1976, after several monthly royalty checks for production had been received from Petitioner.

The trial court issued a declaratory judgment that the Mining Lease had expired and subsequently found, without any hearing, that Petitioner was a bad faith trespasser as a matter of law, thereby approximately trebling the damages Respondents would have otherwise recovered for Petitioner's alleged trespass. Petitioner was denied any

meaningful opportunity to be heard, on the issue of Petitioner's good faith, by either a jury or the trial court (R. 300-302). The Appellate Court sustained the trial court's finding of trespass, but found the issue of good faith to be a "crucial issue" on which Petitioner should have been heard (App. 25a). To rectify the error, the Appellate Court ordered a remittitur to an amount that excluded punitive damages (App. 36a). The Illinois Supreme Court sustained the trial court's interpretation of the Mining Lease and reinstated the penal sanctions imposed for the allegedly bad faith trespass. Petition for Rehearing was filed with the Supreme Court of Illinois, specifically pointing out at pages 19-23 and 27-29 the deprivation of Petitioner's constitutional rights by the ruling of the Supreme Court of Illinois. The Petition was denied on November 26, 1980.

REASONS FOR GRANTING THE WRIT

Introduction

In its decision, the Illinois Supreme Court imposed almost three million dollars in punitive damages as a matter of law for an allegedly bad faith trespass under a disputed claim of right in mining America's most plentiful natural energy resource. To do so, the court retroactively exposed the lessee coal company to millions of dollars in penal sanctions for failure to comply with legal proscriptions that were unknown at the time the lessee acted. This violation of the constitutional right of fair warning was compounded by the refusal of the Illinois courts to grant Petitioner the minimum requirement of the Due Process Clause of the Fourteenth Amendment—an opportunity to be heard on the only defense to the penal sanctions.

The Illinois Supreme Court's decision holds that upon communication to a lessee coal company of a lessor's claim that a mineral lease has expired, all subsequent mining, despite good faith reliance upon advice of counsel, subjects the lessee coal company to penal sanctions for bad faith trespass as a matter of law. The lessee coal company thus must comply with two newly-created duties: the lessee coal company must seek a declaratory judgment that the mineral lease is still valid upon the first notice of any claim whatsoever to the contrary, or the lessee coal company must renegotiate the existing lease that it reasonably believes to be valid and enforceable. Failure to comply with these newly-created duties now subjects a lessee coal company to penal sanctions as a matter of law, despite the lessee coal company's good faith reliance on the

advice of counsel that the subject lease is still valid and enforceable.

These new duties, never before imposed, were applied to Petitioner with no respect for Petitioner's right to be heard before being punished.

The energy resource involved herein, and any change in the law governing its extraction, has national importance. America's most abundant resource—coal—continues to be underutilized. Given the recently expressed national commitment to accelerated development of coal and Illinois' prominent position in supplying this vital mineral, as Illinois possesses more potential energy than all the oil reserves in the Middle East, the errors of the Illinois Supreme Court create dangers to American energy development, as well as to constitutional fairness, that cannot be overlooked, and that need to be redressed by this Court.

I. THE CONSTITUTIONAL VIOLATION IN THE INSTANT CASE MERITS REVIEW DUE TO THE CONSEQUENT DISRUPTION OF COMMERCIAL EXPECTATIONS AND FRUSTRATION OF RATIONAL ENERGY DEVELOPMENT.

Injustices and frustrations of commercial expectations in extractive industries are of particular concern to this Court, given recent changes in international energy markets. In an economic and political climate that mandates capital investments of unprecedented proportions, the fairness with which justifiable commercial expectations are treated is highly determinative of the energy industry's ability to attract resources and commit them to uses that will satisfy United States energy needs. In such a setting, violations of the fundamental fairness guaranteed by the

Due Process Clause will necessarily precipitate timidity in the exploration of America's national resources. Such timidity cannot now be afforded.

Less than three years ago, this Court limited the imposition of penal sanctions to punish business conduct lying close to the line of illegality and undertaken for salutary reasons. In *United States* v. *United States Gypsum*, 438 U.S. 422, 441 (1978), this Court required proof of criminal intent in antitrust prosecutions of conduct that might have been thought procompetitive. Herein, where the Illinois Supreme Court has expressly analogized its punitive award to a criminal sanction, Petitioner—which sought legal advice before exercising its perceived rights under a disputed claim—has been punished for conduct it could not retroactively have corrected to accommodate the announcement of an unanticipated change in the law. Petitioner respectfully urges this Court to review the Illinois Supreme Court decision, which promises a chilling effect in one of America's most vital industries.

II. THE ILLINOIS DECISIONS HEREIN DRAMATICALLY CHANGED PRIOR MINING LAW AND RETROACTIVELY IMPOSED PENAL SANCTIONS IN VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS.

Retroactive application of newly-created legal duties can violate the Due Process Clause's requirement of fundamental fairness when the consequences of such retroactivity are particularly "harsh and oppressive." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 17 n.13 (1977); *Welch* v. *Henry*, 305 U.S. 134, 147 (1938). Satisfactory justifications for prospective applications of new rules may offend the Due Process Clause when offered

as justifications for retroactive applications. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976).

For as long as mining claims have existed and been subject to dispute, courts have distinguished between good faith and bad faith trespassers on the basis of the subjective belief of the trespasser and the sincerity of his attempts to mine only that property to which he was entitled. In the hundreds of reported cases litigating the good or bad faith status of trespassing mining companies one indicium of good faith stands out above all the rest. No factor or aggregate of factors is as frequently relied upon to indicate good faith as is proof of advice of counsel regarding the merits of a defendant's claimed mineral rights. The dissenting justices of the Illinois Supreme Court and the three judges of the Illinois Appellate Court attempted to respect Petitioner's reliance upon former legal principles and the advice of its attorneys, and found the matter too factually complex to be treated as a matter of law. 82 Ill. 2d at 413-14; 69 Ill. App. 3d at 150 (App. 59(a)-60(a), 25a).

Petitioner did not and does not argue that advice of counsel creates a *per se* immunization of trespass by extractive companies. Rather, Petitioner submits that the decision herein disregards, as a matter of law, the objective evidence most often relied upon by courts as probative of a trespasser's good faith.

Like the dissenting Illinois Supreme Court justices and the three judges of the Appellate Court, the federal courts, which for the better part of a century adjudicated thousands of competing claims to the mineral and timber rights of vast public lands as well as private holdings, repeatedly were predominantly influenced by reliance upon

advice of counsel in deciding questions of good faith trespass. *E.g., Mason* v. *United States,* 260 U.S. 545, 556 (1922); *United States* v. *St. Anthony R. Co.,* 192 U.S. 524, 542-43 (1904); *Delta Drilling Co.* v. *Arnett,* 186 F.2d 481 (6th Cir. 1950), *cert. den.,* 340 U.S. 954 (1951); *United States* v. *Homestake Mining Co.,* 117 F. 481 (8th Cir. 1902); *United States* v. *Midway Northern Oil Co.,* 232 F. 619, 632-33 (S.D. Cal. 1916); *United States* v. *McCutchen,* 238 F. 575, 593 (S.D. Cal. 1916); *United States* v. *Eccles,* 111 F. 490, 492 (D. Utah 1901).

The federal courts, which will increasingly be the forums for mineral development litigation in the near future, have understandably avoided imposing the newly announced Illinois rule, which guarantees congested courts by requiring judicial resolution of every mineral contract dispute by declaratory judgment proceedings, under penalty of millions of dollars in punitive damages.

This Court strongly endorsed use of reliance on advice of counsel in *United States* v. *St. Anthony R. Co.,* 192 U.S. 524, 542-43 (1904), and later demonstrated the importance of such reliance by finding a good faith trespass although the defendants had proceeded in the face of a governmental order withdrawing the mined land from territory available for mining. *Mason* v. *United States,* 260 U.S. 545, 556 (1922). The defendants therein sincerely relied upon counsel's advice as to the invalidity of the order and mined the land despite notice of the government's position. On such facts this Court upheld the fact finder's right to find a good faith trespass.

The law in extractive industries has been clear for years; resort to the courts in every dispute is not necessary. What is necessary is a careful legal evaluation and action demonstrating a sincere belief in the title claimed.

See e.g., Delta Drilling Co. v. *Arnett,* 186 F.2d 481 (6th Cir. 1950), finding good faith despite notice of a controversy over the lessee's rights. "Good faith, under this rule, is not necessarily dependent upon ignorance of an adverse claim." *Backer* v. *Penn Lubricating Co.,* 162 F. 627, 632 (6th Cir. 1908). On the contrary, notice of an adverse claim is quite often the reason for seeking advice of counsel. No duty to immediately file an action upon notice of a real or possible dispute has been imposed by the courts, until the instant decision.

So, too, the courts of the several states most often presented with mining questions have repeatedly acknowledged advice of counsel as the bellwether on issues of good faith. *E.g., Dilworth* v. *Fortier,* 405 P.2d 38 (Okla. 1964); *Sapula Petroleum Co.* v. *McCray,* 277 P. 589, 136 Okla. 269 (1929); *Swiss Oil Corp.* v. *Hupp,* 69 S.W.2d 1037, 253 Ky. 552 (1934); *Kentucky Harlan Coal Co.* v. *Harlan Gas Coal Co.,* 53 S.W.2d 538, 245 Ky. 234 (1932); *Lebow* v. *Cameron,* 394 S.W.2d 773, 777 (Ky. App. 1965); *Cooke* v. *Gulf Ref. Co.,* 65 So. 758, 135 La. 609 (1914); *Alaska Placer Co.* v. *Lee,* 553 P.2d 54 (Alaska 1976); *Robinson* v. *Gordon Oil Co.,* 253 N.W. 218 (Mich. 1934).

Illustrative of Petitioner's contention are the recent opinions in *Lebow* v. *Cameron* and *Alaska Placer Co.* v. *Lee.* In *Lebow* v. *Cameron,* 394 S.W.2d 773. 777, the Kentucky Court of Appeals found good faith reliance on an attorney's advice that a competing lease, shown to the defendant by its holder, was inferior to the defendant's lease. Perhaps most analogously, the Alaska Supreme Court found defendant trespassers in good faith in mining beyond the termination of their lease rights on advice of counsel, in *Alaska Placer Co.* v. *Lee,* 553 P.2d 54. As herein, the miners were aware of the opposing

party's conflicting interpretation, but continued mining, sincerely believing in their disputed contract rights.

The majority opinion below rejected federal and state authority on the measure of damages and adopted a unique and draconian approach that guarantees a punitive result whenever an Illinois court decides an honestly disputed title question against a coal lessee. As a result, Petitioner must pay almost three million dollars in damages, which the court repeatedly characterized as punitive. The purposes of this punitive measure were expressly stated to be punishment and deterrence. The Illinois Supreme Court's prior decision in *Mattyasovszky* v. *West Towns Bus Co.*, 61 Ill. 2d 31, 330 N.E.2d 509 (1975), had noted that constitutional issues may be involved by civil assessment of penal sanctions whose purposes "are the same as those which motivate the criminal law." 61 Ill.2d at 35-36.

Before the instant decision, the Illinois Supreme Court had recognized that the penal nature of punitive damages precludes their imposition when conduct has been condemned, or a duty has been imposed, only retroactively. *See Silver Mfg. Co.* v. *General Box Co.*, 76 Ill. 2d 413, 416-17, 392 N.E.2d 1343 (1979); *Kelsay* v. *Motorola, Inc.*, 74 Ill. 2d 172, 187-88, 384 N.E.2d 353 (1978). Furthermore, in *Kelsay*, Illinois adopted the language of at least one other state Supreme Court that denied recovery of punitive damages in a situation of retroactive punishment for constitutional reasons:

> " 'If we held that punitive damages could be awarded in the present case we would be permitting the jury to punish defendants for conduct which they could not have determined beforehand was even actionable. The assessment of punitive damages has some of the same functions as the sanctions of criminal law

> [citation]. The sanctions of the criminal law cannot constitutionally be imposed when the criminality of the conduct is not capable of being known beforehand.' " *Kelsay* v. *Motorola, Inc.*, 74 Ill. 2d at 188, 384 N.E.2d 353, citing *Nees* v. *Hocke*, 272 Ore. 210, 536 P.2d 512, 517 (Ore. 1975).

The law's complete distaste for retroactively imposed punishment has long been the basis for decisions holding unconstitutional those statutes that did not clearly warn defendants of the conduct proscribed by law. This Court stated as follows:

> ". . . [B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972).

A vague law is unconstitutional because a defendant is not given an opportunity, before punishment, to know clearly the proscribed conduct and to avoid it. The vice of such a law is its potential for interpretations that categorize a defendant's conduct as deserving of punishment only after the defendant has acted.

The constitutional rule espoused in *Grayned* applies equally to civil and criminal cases, *A.B. Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 239 (1925); *Cline* v. *Frink Dairy Co.*, 274 U.S. 445 (1927); *Connally* v. *General Constr. Co.*, 269 U.S. 385 (1926), and is not limited to cases involving civil liberties. *See, e.g., United States* v. *National Dairy Products Corp.*, 372 U.S. 29 (1963); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975); *United States* v. *Powell*, 423 U.S. 87, 92 (1975).

The "chilling effect," long recognized in holding unfairly vague limits on freedom of speech and of the press to be unconstitutional, is equally applicable in commercial contexts, as this Court noted in *United States* v. *United States Gypsum,* 438 U.S. 422 (1978).

The essence of the constitutional requirement that defendants be punished only if adequately warned, is that the law must convey, to those who must obey it, a sufficiently definite understanding of proscribed behavior so that "men may conduct themselves so as to avoid that which is forbidden." *Rose* v. *Locke,* 423 U.S. 48, 50 (1975). *See also, United States* v. *Petrillo,* 332 U.S. 1, 8 (1947). When "men of common understanding must necessarily guess at [the] meaning of the law's proscriptions," those proscriptions cannot be the basis for punishment. *Connally* v. *General Constr. Co.,* 269 U.S. 385, 391 (1926). *See also, Coates* v. *City of Cincinnati,* 402 U.S. 611, 614 (1971).

Herein, Petitioner did far more than guess at the law. As in the past, Zeigler, like other members of the industry, sought, obtained, and relied upon advice of reputable counsel, mining only after obtaining careful evaluation of its lease rights from both inside and outside counsel. Petitioner Zeigler had no knowledge that the law would punish its omission to renegotiate a lease that it believed valid or its omission to seek a declaratory judgment. Had it been fairly warned that a failure to seek a declaratory judgment would precipitate a penalty of nearly three million dollars—almost 100 times the contract price for the coal—Petitioner could have and would have sought such a judgment.

Respect for reliance upon advice of counsel is especially important in any case involving future mineral develop-

ment, where the contracting parties must generate, and abide by, a document describing extremely complex property interests. The Appellate Court opinion underscored the complexity of the lease term by proposing three plausible, but divergent, interpretations. 69 Ill. App. 3d 141-46, 150 (App. 12a-19a, 25a). Like the uncertainty surrounding the dividing line between anti- and pro-competitive conduct noted by this Court in *United States* v. *United States Gypsum*, 438 U.S. 422 (1978), the ambiguity of the nature and duration of Petitioner's claimed property interest strongly argues against finding Petitioner's pursuit of its interpretation of the document to have been willfully unlawful conduct.

Retroactive definition of that conduct which will be held to demonstrate bad faith smacks of the same unfairness that necessitates the constitutional prohibition of *ex post facto* laws. In *Bouie* v. *Columbia*, 378 U.S. 347 (1964), this Court held that the evils prohibited by the Due Process Clause may have legislative or *judicial* origins. Judicial definition of illegal conduct, when implemented by retroactively imposed punishment, runs as far afoul of the Due Process Clause as does an *ex post facto* law written by the legislature. 378 U.S. at 352-54.

Thus, the constitutional right of fair warning was as effectively and as unconstitutionally denied Petitioner and the coal industry by the Illinois Supreme Court, as it would have been had the legislature changed the Declaratory Judgment Act to require its use in all contract disputes, under criminal penalty, and applied such a rule retroactively. Petitioner respectfully urges this Court to review the decision below and redress Petitioner's denial of due process.

III. PETITIONER'S RIGHT TO DUE PROCESS WAS DENIED BY THE REFUSAL OF THE ILLINOIS COURTS TO GRANT PETITIONER AN OPPORTUNITY TO BE HEARD ON THE ISSUE THAT WAS DETERMINATIVE OF PETITIONER'S LIABILITY FOR PENAL SANCTIONS.

Petitioner was never given a hearing on the reason for its punishment. This Court has never tolerated punishment without a meaningful opportunity for defense. Petitioner's good or bad faith was never the subject of any motion or hearing. After a motion in limine, not directed at Petitioner's good faith, Petitioner was informed that proof of reliance on advice of counsel would be inadmissible. Petitioner was completely foreclosed from arguing its good faith or its right to prove good faith by the Illinois courts' unanticipated announcement that this key issue would not be open to fact finding or legal argument.

This Court has repeatedly emphasized that due process requires, at a minimum, a meaningful opportunity to be heard before one is deprived of property interests. *Memphis Light, Gas & Water Div.* v. *Craft,* 436 U.S. 1, 16 (1978); *Wolff* v. *McDonnell,* 418 U.S. 539, 557-58 (1974). Herein, the trial court decided, without a hearing, the central issue that rendered Petitioner liable for an amount almost 100 times the price at which it had contracted to buy the Respondents' coal.

A hearing "in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument, however brief, and, if need be, by proof, however informal." *Londoner* v. *Denver,* 210 U.S. 373, 386 (1908). Having been foreclosed from any such

opportunity, subsequent arguments in the appellate courts of Illinois could not overcome the prejudice Petitioner had suffered. Without the opportunity to fully substantiate its claim of good faith, through proof of Petitioner's reliance on advice of counsel, Petitioner could not persuade the Supreme Court of Illinois to uphold the good faith measure of damages imposed by the Illinois Appellate Court, despite Petitioner's success in previous actions similar to that brought by Respondents. In effect, Petitioner was then punished by the Illinois Supreme Court for the trial court's refusal to hear Petitioner on the issue of good faith.

Although the Appellate Court had found the issue of good faith crucial and too complex to be decided as a matter of law and without a hearing, a divided Supreme Court held Petitioner to the inadequate Record and imposed penal sanctions, finding Petitioner's claim of good faith "unpersuasive on this record." Petitioner was thereby denied the fundamental fairness owed to one whose property is subject to a risk of a fine of almost three million dollars for allegedly bad faith conduct.

CONCLUSION

Violations of the United States Constitution are always significant. In today's energy industry, the violations revealed by the Record in this cause bear a special significance. Such violations foreshadow the necessary commercial response to unfairness, in an industry where such a response cannot be afforded.

Retroactive punishment of conduct, imposed only after the conduct has been undertaken, serves no constructive deterrent function. Petitioner cannot now change that conduct. Even assuming that Petitioner can be fairly ordered to compensate Respondents for an alleged tort that amounts to no more than an erroneous contract interpretation, Petitioner submits that fundamental fairness is certainly denied at the point that compensation ends and punishment begins. To hold otherwise is to deny Petitioner the right that makes law meaningful—the right to an opportunity to conform to the law before being punished for not conforming.

In economic circumstances that emphasize planning and investment, penal sanctions for conduct that is arguably legal when undertaken, but subsequently held illegal, can only increase unnecessarily the risks of investment and destroy the certainty that is indispensable in efficient development in the mining industry.

Furthermore, to interpose this obstacle to sound decision-making, without a factual finding or an opportunity for legal argument, is to abdicate entirely the judicial responsibility to afford those procedural guarantees that

ensure the rationality of legal decision-making, that guard against arbitrary and capricious conduct, and that foster a proper respect for a system built on fairness. To redress the constitutional violations that have occurred in the instant case, Petitioner respectfully urges this Court to grant the Writ requested herein.

Respectfully submitted,

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APPENDIX A

(OPINION OF APPELLATE COURT OF ILLINOIS)

PHILLIP A. DETHLOFF *et al.*,
Plaintiffs-Appellees and Cross-Appellants,

vs.

ZEIGLER COAL COMPANY,
Defendant-Appellant and Cross-Appellee.

Fourth District No. 15024
Judgment affirmed.

Opinion filed February 28, 1979—Supplemental opinion filed on denial of rehearing March 30, 1979.

1. DEEDS OF CONVEYANCE (§126)—*condition subsequent distinguished from special limitation.* Distinction of estate on condition subsequent and estate on special limitation is primarily requirement of notice, an estate on limitation terminating automatically while estate on condition subsequent continues until notice that conditions will be enforced.

2. MINES AND MINERALS (§17)—*coal lease construed to be for primary term of 25 years.* Coal lease would be construed to be for primary term of 25 years, at end of which term lease was to be automatically extended by "thereafter" clause if, at end of term, coal had been found on premises and lessee considered it profitable to commence production, but, if 25-year period ended and there was no ongoing production at that time, lease would be held to terminate by its own terms.

3. MINES AND MINERALS (§7)—*instrument construed as coal lease rather than creation of freehold in coal rights.* Instrument would be construed as coal lease for 25 years, with self-executing extension clause at end of 25-year period if condition of coal being produced were met, rather than as creating freehold and as acting as conveyance of coal.

4. DAMAGES (§165)—*opinion dealing with measure of damages for trespassory taking of oil and gas held applicable to taking of coal.* Illinois Supreme Court opinion of 1944 discussing measure of damages for trespassory taking of oil and gas would be deemed equally adaptable to cases dealing with taking of coal, and would be held to have changed Illinois law of damages recoverable from good faith trespasser to conform to general rule, so that good faith trespasser is allowed to deduct his production costs from value of coal as measured at mouth of pit, but court could not say that Illinois rule, under which wilful trespasser receives credit for costs of moving coal to pit mouth, or other place, was changed so as to be brought into conformity with general rule under which wilful trespasser receives no such credit.

5. VENUE (§30)—*application for change of venue is not timely if judge has ruled on substantial issue.* Application for change of venue premised upon prejudice of inhabitants of county is not timely filed if trial or hearing begins and judge has ruled on any substantial issue (Ill. Rev. Stat. 1977, ch. 110, pars. 501(2), 503).

6. APPEAL AND ERROR (§1655.5)—*denial of motion for change of venue will not be disturbed in absence of abuse of discretion.* Denial of motion for change of venue based upon defendant's claim of prejudice of inhabitants of county would not be reversed in absence of showing of abuse of discretion.

7. ARGUMENTS OF COUNSEL (§5)—*counsel's comments concerning sale price of coal improperly taken were proper.* In damage action for trespassory taking of coal from ground by lessee after expiration of lease term, comment of plaintiff's attorney during opening argument that sale price for coal at mine approached certain amount of money per ten was not improper, there being no error in assuming that value of coal taken by trespasser was price obtained by trespasser for that coal at mine, less credits allowed by law, that being essentially what counsel was saying.

8. EVIDENCE (§657)—*computer printouts showing defendant's business records as to price received for coal allegedly improperly taken properly admitted in evidence.* In damage action for trespassory taking of coal from ground by lessee after expiration of lease term, computer printout of defendant's business records showing prices received for coal from mine was relevant exhibit and was properly received in evidence.

9. DEPOSITIONS (§48)—*deposition of pubilc official properly admitted in evidence.* Deposition of public official which concerned tests made under supervision and control of such official in connection with such official's duties was properly admitted in evidence.

10. DAMAGES (§43)—*defendant was entitled to credit for steps taken to bring coal to state of being coal f.o.b. mine—action for trespassory taking of coal.* In damage action for trespassory taking of coal from ground by lessee after expiration of lease term, defendant was entitled to recover costs for loading and hauling coal to mouth of mine and to receive credit for steps in preparing coal to state where it became coal f.o.b. mine, especially since plaintiffs were relying on defendant's sales price for valuation.

11. DAMAGES (§214)—*wilful trespasser is not allowed to deduct costs of mining coal in action for trespassory taking of coal.* Rule of damages does not allow wilful trespasser to deduct coal mining costs in damage action for trespassory taking of coal from ground, but costs of mining are relevant in case of good faith trespasser.

13. TRESPASS (§46)—*instruction characterizing action as being one for trespass to land was not erroneous.* In damage action for trespassory taking of coal from ground by lessee after expiration of lease term, giving of instruction stating that court had already entered judg-

12. HARMLESS AND PREJUDICIAL ERRORS (§6)—*error not affecting verdict will be deemed harmless.*

ment that defendant was liable to plaintiffs for mining of coal from plaintiffs' property and characterizing lawsuit as action for trespass to land would not be held error.

14. TRESPASS (§46)—*injection of eminent domain concept of just compensation would not have been proper —action for trespassory taking of coal.* In damage action for trespassory taking of coal from ground by lessee after expiration of lease term, injection, by way of instruction, of eminent domain concept of just compensation, would not have been proper.

15. INSTRUCTIONS (§190)—*denial of defendant's instruction reciting that verdict must be unanimous was not error.* Better practice is to have jury instructed that their verdict must be unanimous, and court expressed hope for amendment of pattern jury instruction reciting in part that, after verdict is reached, appropriate form of verdict supplied with instructions is to be filled in and signed and returned to court, but no error would be held to have resulted where defendant's instructions reciting that verdict must be unanimous were denied and such pattern jury instruction was given, verdict was signed by each member of jury, and jury was also polled.

16. TRESPASS (§31)—*laches and estoppel held inapplicable to action for trespassory taking of coal. Laches* and estoppel did not apply in damage action, instituted shortly after improper entry, for trespassory taking of coal from ground after expiration of lease terms by lessee which pointed out that it expended large sums of money in developing its mine, of which underground portion of plaintiffs' land formed a part, and which claimed that plaintiffs simply stood by until their coal was mined.

17. ACCORD AND SATISFACTION (§2)—*theory of accord and satisfaction was dissipated by fact that plaintiff never cashed checks—action for trespassory taking of coal.* Theory of accord and satisfaction, said to arise from plaintiff's retention of royalty checks, was dissipated where such plaintiff, in damage action for trespassory

taking of coal from ground by lessee after expiration of lease term, asserted he retained such checks only to later prove quantity of coal taken and checks were never cashed or deposited.

18. TRESPASS (§47)—*law implies at least nominal damages for wrong.* Absolute failure of proof on measure of damages would not entitle defendant to directed verdict in trespass case, since law implies at least nominal damages for wrong.

19. DAMAGES (§647)—*trial court properly precluded jury from considering punitive damages in action for trespassory taking of coal.* Trial court would be held to have properly precluded jury from considering punitive damages, alleged in damage action for trespassory taking of coal from ground by lessee after expiration of lease term, in view of fact that defendant's conduct was not oppressive or vindictive, even though it may have been wilful disregard of plaintiffs' rights, and in view of fact that measure of damages in cases of such nature does more than simply compensate plaintiffs for any loss, and in view of fact that punitive damages are not favored in law and their application is to be carefully watched.

APPEAL from the Circuit Court of Douglas County; the Hon. JAMES N. SHERRICK, Judge, presiding.

John H. Armstrong, Paul R. Lynch, and Richard F. Record, Jr., all of Craig & Craig, of Mattoon (James B. Rice and Arthur R. O'Brien, of counsel), for appellant.

Harold A. Baker, of Hatch & Baker, of Champaign, and Raymond Lee, of Tuscola, for appellees.

Mr. JUSTICE MILLS delivered the opinion of the court:

Coal lease.

Verdict for plaintiffs: $4,019,867.08.

We affirm upon remittitur to $1,573,455.57. Otherwise, we reverse and remand for a new trial.

This will be a long opinion. The facts are prolix and complex, but their tiresome recitation is requisite to a hopefully lucid discussion of the substantial issues before us on appeal.

On June 20, 1945, the Dethloffs' predecessors in title executed a mining lease in favor of Zeigler's predecessors in title. The lease covered a 40-acre tract located in Douglas County, Illinois, and by its terms, pertained to "all of the coal lying in or under" that property. Plaintiffs acquired their title to the property as joint tenants on October 18, 1969, for a payment of $20,000, and it is agreed by the parties that the mining lease was in full force and effect at least until the time of the conveyance of October 18, 1969. Through various mergers and name changes, Zeigler is the present lessee.

The Dethloffs sued Zeigler as follows: Count I sought compensatory damages for a trespassory taking of coal commencing on or about January 10, 1976; count II asked for punitive damages for the trespass based upon the alleged wilful, malicious and deliberate actions of Zeigler; count III prayed for a declaration that the mining lease expired by its own terms solely because there had been no mining or removal of coal from the premises by Zeigler prior to June 20, 1970 (which was 25 years after the lease was executed). Zeigler's answer denied the material allegations and asserted the affirmative defenses of laches and unreasonable delay, estoppel and accord and satisfaction.

A hearing before the circuit court on count III (terms of the lease) was held on September 14, 1977. It was established that Zeigler's mining operations commenced on the leased property in January 1976. Mr. Dethloff testified that at the time of acquisition of the property he knew of the existence of the mining lease and was aware of the terms of the lease. Sometime in 1971, plaintiffs' attorneys commenced correspondence and negotiation with the defendant respecting the lease in question and in July of that year H. E. Wenninger, general

mine manager, was directed to contact plaintiffs' attorneys. In approximately May 1975, Dethloff went to Zeigler's Murdock, Illinois, offices where he learned from an employee of defendant that within perhaps a year mining operations would be commenced under plaintiffs' land. Dethloff then recontacted one of his attorneys. An advance royalty payment and a transmittal letter (bearing date of March 25, 1976) from defendant were received by plaintiff and placed in his lock box, since he considered them to be evidence of mining a certain quantity of coal. He did not cash the check. Other similar checks and transmittal letters reflecting production of coal by defendant from the land in question were subsequently received by Dethloff and similarly handled.

George P. Latchford III (called by plaintiffs under section 60) testified that he had been a licensed attorney in Illinois since 1955 and was senior vice president of finance and general counsel for Zeigler, a position that he had held since about May 1973. He knew on June 2, 1975, that plaintiffs had taken the position (as early as 1973) that the mining lease had previously expired and he was still of the opinion, as he was in 1972, that the defendant should proceed under the lease and he intended to recommend to defendant to go forward with mining operations. He said that the first time coal was mined under plaintiffs' property was in January 1976, and the first royalty check was March 25, 1976. He allowed as how the royalty check and transmittal letter were probably the first notice to the plaintiffs that coal was in fact being mined. Zeigler continued its mining operations under plaintiffs' land, notwithstanding receipt of the original of plaintiffs' exhibits 13-16, and notwithstanding receipt of papers commencing the present litigation. Plaintiffs' exhibit 15 is an opinion of counsel relating to the mining lease in question rendered on or about November 30, 1973, to defendant.

On direct, Latchford testified that Zeigler has never received from plaintiffs a copy of their deed of conveyance and received no instructions subsequent to 1969

with respect to payment or the depositing of advance royalties or delayed rentals; that the coal mine (of which the underground portion of plaintiffs' land formed a part) is approximately 200 feet below the surface, deploys four operating units or four separate sets of equipment and is equipped to wash coal; that modern equipment is used and underground haulage is accomplished by electrically driven belts; that the coal is raised to the surface by the same method as a slope belt; that the production capacity of the mine is about 1,500,000 tons per year; that there are at least 5,000-6,000 acres of ground under lease as part of the mining operation; that many acres under lease are necessary to economically justify investment in a mine; and that obtaining mining leases was relied upon prior to initial installation of the mine. (There was an offer of proof that large sums of money had been invested in the mine, that approximately 350 people are employed at the Murdock Mine, and that several miles of mining corridors were present in the mine, but the circuit court rejected the offer.)

The circuit court opined that there was no ground for legal action by plaintiffs until the knowledge of the alleged trespass was known and that he saw no laches or estoppel. His written order declared that the lease expired by its own terms on June 20, 1970, at the end of 25 years. Defendant filed a motion for rehearing and to vacate the judgment and plaintiffs filed a motion to strike. Defendant, over objection of plaintiffs, presented testimony by offers of proof (a chief mining engineer, a mining expert, and an accountant), which were rejected by the circuit court. Motion for rehearing was denied and the trial judge sent a letter to counsel of record setting forth the reasons for his rulings. In that memorandum he indicated that the "basic problem" presented in count III was "the meaning" of the clause referring to a specific 25-year term, stated that under Illinois law there is an implied covenant to produce within a reasonable time, found that the language in the instant mining lease was almost identical to language used in standard oil and gas leases, and held that: "I believe this clause has uni-

versally been construed to grant the right to produce within the stated term and to continue production for so long as there is any oil. If production is not attempted on the premises within the term, the lease expires."

Thereafter, Zeigler moved to transfer venue of the case to Piatt County and for summary judgment on count II (punitive damages). Over 200 affidavits in support of the petition for transfer of venue were filed by Zeigler, and plaintiffs filed six affidavits in opposition. The circuit court denied transfer of venue and allowed summary judgment on count II.

The cause went to jury trial on count I (compensation for trespassory taking of coal). In chambers prior to voir dire the Dethloffs argued their motion to strike Zeigler's affirmative defenses (laches, estoppel, accord and satisfaction) which—over objection—the circuit court allowed. In the course of the argument on plaintiffs' motion in limine (which would exclude defendant's evidence of good faith), they moved to amend by omitting language from count I reading "* * * knowingly, wantonly and wilfully, and with force and arms," and there being no objection by defendant, it was allowed. The operative language of count I was reduced to "Defendant * * * broke and entered said vein of coal * * *." The trial judge ruled that once the plaintiffs had communicated to defendant a claim that the lease had expired, any mining thereafter could not be in good faith, and the question of whether there was good faith or not was not for the jury, but for the court. The motion in limine was allowed. (The motion for change of venue was renewed, but again denied.)

Upon trial, the evidence may be compressed and summarized like this:

GEORGE SEAMAN (surveyor for Zeigler): testified as to measuring the quantity of coal taken; coal is weighed when sold or shipped; it is possible for the amount of coal mined to be computed from the figures he recorded in field book #6.

ROBERT HINKLE (mine superintendent): all coal goes through a rotary breaker for sizing and discharge of impurities; some is crushed, some washed; raw coal is coal that has gone through the breaker and the crusher.

THOMAS G. CORMAN (vice president and comptroller of Zeigler): testified as to sales prices realized by defendant; an average sales figure of $19.88 per ton; this is determined by dividing the total dollars realized by defendant by the tons sold to arrive to an average price; the figure is an "arithmetical" average of the number of contract prices, divided by the number of customers; the figure is also stated as $19.33.

(Over objection, Zeigler's answer to a written interrogatory was read to the jury: The cost of loading and hauling coal from the place where mined to the foot of the shaft is $1.038 per ton.)

ROY HELFINSTINE (head of the Mineral Section, Illinois State Geological Survey—over objection, read from the evidence deposition): Two exhibits are part of sulphur reduction of Illinois coal washability studies; Part I refers to samplers taken from 1967 to 1969, including samples from the Murdock Mine; washability tests were made under his supervision and direction.

GEORGE EADIE (mining engineer and professor): by his calculations, 5,610,030 cubic feet of coal had been removed from plaintiffs' property; coal has a weight of 85 pounds per cubic foot; cubic footage multiplied by weight gives 238,426 tons as the amount of coal removed; this is untreated, raw coal; figures are subject to a margin of error of 1.5%. (He apparently bases the weight figure on the tests run under Helfinstine's direction.)

Plaintiffs rested. Defendant's motion for directed verdict was denied.

CLAYTON SLACK (vice president for engineering of Zeigler): the marketable tonnage extracted from plaintiffs' tract was 215,247.40 tons.

THOMAS G. CORMAN (comptroller): by offer of proof, attempted too show Zeigler's costs of mining. (The evidence was excluded.)

GEORGE P. LATCHFORD (corporate counsel): evidence of the good faith nature of Zeigler's actions; he was aware of a potential dispute over the lease before 1973; the lease was examined by a "land lawyer" employed by Zeigler, by Latchford himself, and by outside counsel; all three concluded that the lease was valid and would continue beyond 25 years; corporate records show royalty payments to the Dethloffs; a similar suit was brought in Douglas County in 1974 but was dismissed; no payment was made to that claimant by defendant; the Dethloff coal either had to be mined sequentially by Zeigler or not at all, because once having passed, the engineering people advised that they could not go back for it.

MACK H. SHUMATE (offer of proof): only way for plaintiffs' parcel to have been mined was for defendant to mine it; exploration showed that the coal was thin, with a bad roof, and was questionable.

HAROLD E. WENNINGER (general mine engineer): in 1976 the royalty offered for coal leases was 15 cents per ton.

SCOTT L. ROGERS (vice president of marketing for Zeigler): offer of proof; all of the Murdock Mine product for 1976 was sold; all was prepared to some extent; none was sold from the mouth of the mine; coal as it was at the mouth of mine, could not be marketed.

ELMER C. HILL (coal broker): offer of proof; coal as it was at the mouth would not be marketable, unless a steam electric plant was located very near the mine.

CHARLES LINKE (an economist and professor): offer of proof; he was familiar with measurement of losses from an economic standpoint; legal rules are not always consistent with economic reality; he measured plaintiffs' rules as worth 15 cents per ton.

The jury returned a verdict for plaintiffs of $4,019,867.08 and judgment was entered accordingly. Defendant appeals from the declaratory judgment (count III) and the jury's money judgment (count I), and plaintiffs' cross-appeal the summary judgment (count II).

TERM OF LEASE

The cardinal issue in this appeal pivots on the construction of the habendum clause of the Dethloff-Zeigler Coal Company lease:

> "This lease shall be and continue for the term of 25 years from and after the date hereof, and for so long thereafter as shall in the opinion of lessee to be necessary to mine and remove all of the coal in and under the above described leased land and other lands in the vicinity thereof, or included in the block of leased coal hereinafter referred to, unless the lease is sooner terminated as hereinafter provided and unless in the opinion of the lessee the coal which can be economically mined in accordance with good and accepted mining practices from said lands shall be sooner exhausted. It is expressly agreed, however, that the rents and royalties hereinafter provided for shall not be payable after such coal in and under the above described real sstate hereby leased cannot be economically mined, as aforesaid. But the right to remove coal and other materials from other lands through any underground ways and entries in said above described leased lands, which rights are hereby expressly granted, shall continue, as an extension of this lease, free of rents and royalties as long as the lessee shall desire to have or use the same, even though all coal economically and practically mineable shall have been mined and removed from the above described leased lands, even though the said terms of 25 years shall have expired."

The trial court's declaratory judgment held that the lease had terminated by its own terms on June 20, 1979.

As already noted, the trial judge held that under Illinois law, there is an implied covenant to produce within a reasonable time, and if production is not attempted on the premises within the term, the lease expires.

A. SELF-EXECUTING EXTENSION CLAUSE?

Production of coal from plaintiffs' land occurred 31 years after the lease was executed. Defendant urges this court to construe this lease as a freehold, contending that by mining in the "vicinity" of plaintiffs' premises within the 25-year term, it has complied with the implied covenant to produce. Plaintiffs, however, contend an estate on special limitation was granted, which expired by its own terms on June 20, 1970.

Plaintiffs cite to us the Oregon case of *Fremont Lumber Co.* v. *Starrel Petroleum Co.* (1961), 228 Ore. 180, 364 P.2d 773. The mineral lease involved there had a term "'* * * for * * * 5 years * * * and as long thereafter as oil, gas or other mineral is produced from said land * * *'" (228 Ore. 180, 186, 364 P.2d 773 776. The defendant-lessee argued that the thereafter clause was a condition subsequent which required notice before the lease would terminate. Agreeing with plaintiff-lessor, however, the court found it to be a 5-year lease on special limitation, with the incident of automatic termination at the end of the primary term unless production was occurring at that time.

The *Fremont* case, incidentally, contains an excellent discussion of the similarities between mining and oil and gas leases, as well as a lucid review of "unless" leases, special limitations, conditions subsequent, "drill or pay" provisions, primary terms and indefinite terms, "thereafter" clauses, and the legal meaning of "mine" and "mining."

The Supreme Court of Pennsylvania in *Pape* v. *Hughes* (1960), 398 Pa. 436, 158 A.2d 547, interpreted a lease which provided for:

> "* * * the sole and exclusive right and privilege of mining, removing and marketing of minerals and ma-

> terial, including gravel, sand, clays, stone and ore • • • for a period of 5 years, 'and for such additional longer period as the hereinbefore mentioned minerals and materials may be found on the premises • • • in sufficient quantity as to be commercially to remove, the duration of said extended period to be determined by the' grantee." 398 Pa. 436, 437, 158 A.2d 547, 548.

In the landowner-lessor's action to quiet title, the Pennsylvania court found as a matter of fact that at the end of the 5-year period specified in the lease, minerals were not found on the premises in sufficient quantity to be removed profitably and that the lease expired at the end of the 5-year period. The condition upon which the lease was to be extended beyond the initial 5-year period was that a commercialy profitable quantity of minerals be found and that that condition exists at the end of the 5-year base term.

A similar analysis was applied by this court in *Metz* v. *Doss* (1969), 114 Ill. App. 2d 195, 252 N.E.2d 410. The lease, dated July 29, 1956, provided for a primary term of 1 year and as long as thereafter as oil or gas or either of them is produced from said land by lessee. A well was drilled within the primary term and gas encountered, but there was no commercial production of gas from the lease at any time. Lessees then attempted to develop the area as a gas storage reservoir. Under the terms of the lease, lessor was entitled to have the lease terminate at the end of the primary term unless there was production. Plaintiff-lessor sought a release of record of an oil and gas lease, and the trial court granted plaintiff summary judgment.

An oil and gas lease was also involved in *Morris* v. *Mayden* (1976), 35 Ill. App. 3d 338, 340, 341 N.E.2d 428, 429. Plaintiffs owned an executory interest in one-half of the oil, gas, and other minerals beneath property they owned in fee that was to become possessory upon the termination of the oil and gas lease between defendant Mayden and the Pure Oil Company. The lease, executed in

April 1936, was to "• • • remain in force for a term of 10 years from this date, and as long thereafter as oil or gas or either of them isp roduced from said land lessee." In the absence of any allegattion that production had ceased from such land, the trial court dismissed on the grounds that plaintiffs failed to show a present interest in the oil and gas.

• 1 The decision of an estate on *condition subsequent* (urged by defendant) and an estate on *special limitation* (argued by plaintiffs) is primarily the requirement of notice. While an estate on limitation will terminate *automatically,* an estate on condition subsequent continues until *notice* that the conditions will be enforced. Zeigler argues that the Dethloffs' failure to provide notice of termination as provided in the lease leads to the conclusion that the lease was in full force and effect at the time of production. However, the notice provisions in the lease are in reference to default or breach on the part of defendant. Plaintiffs' action for declaratory judgment was not premised on default or breach—it was based on the expiration of the lease by its own terms.

The Dethloffs refer this court to the recent case of *Shannon* v. *Stookey* (1978), 59 Ill. App. 3d 573, N.E.2d 881, in further support of their position. Shannon brought an action alleging abandonment of an oil and gas lease and the equipment thereon. The Shannon lease was executed January 9, 1974, and was extended to run until July 23, 1974, or as long thereafter as oil and gas was produced. The evidence was undisputed that during the primary term, no oil or gas had ever been produced. The court pointed out that the lease had expired under its own terms prior to the alleged abandonment.

The special limitataion construction concept found in *Fremont* and urged by plaintiffs is somewhat confusing since limitations traditionally cut short estates in land rather than extend such estates. Although the effect is essentially the same, the limitation terminology does not appeal to us and we purposefully avoid it.

• 2 The analysis, however, applied in interpreting the habendum clauses of the mineral leases in *Fremont, Pape, Metz* and *Morris* stand for sound and solid reasoning, and we believe it to represent the correct yardstick by which to measure the lease before us. In 1945, the original parties entered into a coal lease for a prmary term of 25 years. If, at the end of this term, coal had been found on the premises and the lessee considered it profitable to commence production, the lease was to be automatically extended by the "thereafter" clause. If, however, the 25-year period ended and there was no ongoing production at that time, the lease terminated by its own terms. (This construction does not require a court to imply a covenant on the part of lessees to produce in a reasonable time, as the trial judge did here. Since there was no production of coal from plaintiffs' land at the end of the primary term, the lease terminated June 20 1970.

B. CONVEYANCE (FREEHOLD) OR LEASE?

But Zeigler contends that the lease creates a freehold estate and acts as a conveyance of the minerals. Since an estate for years is a nonfreehold estate, a classification of this instrument as a freehold would, of course, render the trial court's interpretation erroneous.

In *Fowler* v. *Marion & Pittsburg Coal Co.* (1924), 315 Ill. 312, 146 N.E. 318, an instrument that conveyed authority to mine all the coal contained in or under the property was held to pass a freehold estate because the lessee was given the unlimited right to go upon the land and mine for coal. *Daughette* v. *Ohio Co.* (1914), 263 Ill. 518, 524, 105 N.E. 308, 310, found a lease "• • • for the term of five years, and as much longer as gas or oil is found in paying quantities • • •" to be a freehold for the reason that it may continue indefinitely. *Bruner* v. *Hicks* (1907), 230 Ill. 536, 537, 82 N.E. 888, 889, interpreted a lease "• • • of ten years or so long as oil and gas might be found on said premises • • •" as a freehold, requiring a release of homestead rights. However, in *Blue Bird Air Service, Inc.* v. *City of Chicago* (1941), 376 Ill. 272,

33 N.E.2d 456, interpreting a lease of hangar space at an airport, the court pointed out that a lease for any number of years is not a freehold.

In determining whether the instrument is a *conveyance* of minerals of *lease* of the minerals, the consideration paid to the lessors is relevant. Under the document here (entitled "MINING LEASE"), lessors were to receive $1 per acre "during the first year of the term," and then $2 per acre "at the end of the second year of *such term* and at the end of *each succeeding year thereof.*" The next sentence of the "MINING LEASE" provides that after Zeigler begins to mine coal from the "described leased lands, if at the end of any year of *such term*" no coal has been taken from the leased land, then $2 per acre shall be paid. Any rent paid to lessors was to be credited as advance royalty when production began and royalties became payable. (A royalty of five cents per ton was set forth.) After 1970, the Dethloffs received no compensation under the lease. Yet Zeigler attempted to pay plaintiffs' royalties in 1976 when production began. We view this as highly significant and rather indicative of intent to treat our document as a lease.

•3 Furthermore, the granting clause itself indicates a lease. To construe this instrument as a conveyance of the coal renders the term of 25 years meaningless. And the parties to the instrument treated it as a lease: Defendant's predecessors assigned to Zeigler their rights under the lease and plaintiffs' predecessors conveyed the coal to the Dethloffs by specific reference. As we read this lease, there is no provision whatever for the payment of rent after the end of the term where mining has not been commenced. We again conclude that this instrument should be construed as a lease for 25 years, with a self-executing extension clause at the end of the 25-year period if the condition of coal being produced is met.

C. IMPLIED COVENANT TO PRODUCE?

The trial court found an implied covenant to produce within a reasonable time under Illinois law. Zeigler cor-

rectly contends there is no express covenant in the mining lease requiring that coal be mined from plaintiffs' land by any specified time. Defendant then argues that by mining coal in the "vicinity" of plaintiffs' premises or in the "block of coal" encompassing plaintiffs' premises within 25 years, it has complied with the implied covenant to produce during the primary term. This contention focuses on this portion of the habendum clause:

> "• • • and so long thereafter as shall in the opinion of Lessee be necessary to mine and remove all of the coal in and under the above described leased lands *and other lands in the vicinity thereof*, or included in the *block of leased coal hereinafter* referred to, • • •." (Emphasis ours.)

Rejecting this contention, the trial court observed that, reading the instrument as a whole, this phrase allowed Zeigler to carry coal mined in the vicinity through the empty passages in plaintiffs' land after the primary term was over.

When faced with the issue, courts have found an implied covenant to produce in mineral leases for a term of years with a thereafter clause. This recognizes that a lessor enters into a mineral lease with the purpose and expectation of receiving royalties. In *Stoddard* v. *Illinois Improvement & Ballast Co.* (1916), 275 Ill. 199, 200, 113 N.E. 913, 914, the lessor of a stone quarry sought damages based on the lessee's refusal to quarry. The lease was "'• • • for a term of ten years, or as long thereafter as the property is suitable for quarrying purposes.'" The court found an implied covenant that the lessees would quarry stone with reasonable diligence if it was found and so long as it was found in a quantity and kind that could be quarried at a profit to the lessee. See also Annot., *Implied obligation of purchaser or lessee to conduct search for, or to develop or work premises for, minerals other than oil and gas*, 76 A.L.R.2d 721 (1961).

It occurs to us that both of the parties and the trial court have unduly emphasized the "implied covenant to

produce" aspect of mineral leases. Zeigler argues that it has complied with its covenant to produce by mining in the vicinity and that this extends its right to mine coal from plaintiffs' premises. The Dethloffs argue that defendant's failure to mine from their land within the 25-year term terminates the lease. And the trial judge found an implied covenant to produce coal from plaintiffs' premises. In our view, what the defendant-lessee covenanted to do during the primary term is not at issue at all, and it is wholly unnecessary to imply a covenant to produce.

On the second page of the lease appears a paragraph that was marked through in pen and "VOID" was handwritten over the printed wording. That stricken paragraph spoke of the proposal to lease "coal in other lands" and "in a substantial block in which the above described leased lands will be included." This provision having been voided, we deem Zeigler's "vicinity" or "block of coal" assertion under the habendum clause as meaningless and the argument simply falls. At best, the terms "vicinity" and "block" are rendered so ambiguous as to afford no clear direction, definition or meaning in the context of this lease.

MEASURE OF DAMAGES

The litigants dispute not only the measure of damages but also the character of the trespass. The remaining two major issues—measure of damages and good faith or wilful trespasser—are inexorably intertwined. They are interdependent and the former is actually determined by which latter category the defendant here qualifies for. *Lambach* v. *Town of Mason* (1944), 386 Ill. 41, 53 N.E.2d 601, discusses the measure of damages for the trespassory taking of oil and gas which we deem equally adaptable to cases dealing with the taking of coal. *Lambach* dealt with a trespasser who acted in "good faith" and the Supreme Court held that such a trespasser was entitled to a credit for the reasonable cost and expenses of drilling, completing, equipping and operating

the well, and producing the oil, less the reasonable value of any of the equipment salvaged. (It is not stated in the opinion at what *point* in the production and distribution chain the value of the oil and gas to the owner was to be determined.)

Lambach relies on *Guffey* v. *Smith* (1915), 237 U.S. 101, 59 L. Ed. 856, 35 S. Ct. 526, a case that arose in Illinois, but was decided under the notions of a Federal common law. The defendants in *Guffey* were assignees under a lease and took their assignment without actual notice of a prior recorded lease that was held by complainants. They acted upon the advice of an abstractor who failed to make a proper examination of the record. With the lessor's approval, lessee-defendants drilled wells and developed oil. When advised of the prior lease and of the complainants' purpose to insist upon their rights and to obtain redress, defendants persisted in the drilling, production, and sale of oil. The Supreme Court held that damages for oil taken up to the point that defendants acquired actual notice of the prior lease were measurable by the value of the oil in the pipeline where sold, less cost of improvements and operations whereby oil was taken from the earth and delivered at the pipeline. The damages for oil taken after actual notice was given, however, were indeed another matter. A distinction between a good faith and a wilful trespass is drawn from this reasoning from *Guffey*:

> "[T]he constructive notice resulting from the recording of the prior lease was not inconsistent with an honest, though mistaken, belief on their [defendants'] part that they had acquired a perfect right to take and dispose of the oil. But the expenses incurred after August 1, 1907, are upon a different footing. On that date Solley and his associates were actually and fully informed of the prior lease and of the complainants' purpose to insist upon the rights conferred by it and to obtain redress for the invasion of those rights, so what was done thereafter cannot be regarded as anything less than a wilful

> taking and appropriation of the oil which was subject to the complainants' superior right." (237 U.S. 101, 118-19, 59 L. Ed. 2d 856, 866, 35 S. Ct. 526, 531-32.)

Although not specifically expressed in the opinion, it seems the wilful trespasser receives no credit for his production efforts.

The annotation at 21 A.L.R.2d 380 (1952) sets out the the general rules: Where the taking of coal is in *good faith,* the so-called mild rule applies. This is the value of the minerals *in situ.* Where such value cannot be ascertained, the measure is (1) the market royalty; (2) the value of minerals after extraction, less production costs. But if the taking is wilful, reckless, or intentional, or without claim of right or title, the trespasser is liable for the enhanced value of the product when and where it is finally converted to the trespasser's use, without any deduction for expenses incurred, or for any value he may have added to the mineral by his labor. (A.L.R. lists the jurisdictions stating this rule as the United States, Alaska, Arkansas, California, Indiana, Kentucky, Louisiana, Maryland, Michigan, Montana, New Mexico, Ohio, Oklahoma, Tennessee, Texas, Virginia, West Virginia, and Wyoming.)

As pointed out in the A.L.R. annotation, *Lambach* was a break with the established Illinois precedent. Our review of the cases leads us to conclude that the measure of damages, without regard to the character of the trespass, had been the value of the coal at the mouth of the pit, less the cost of conveying the coal from the place where dug to the mouth, but not allowing credit for mining and digging. The seminal case appears to be *Robertson* v. *Jones* (1874), 71 Ill. 405. There, the question presented for review was the correct measure of damages and the court said this:

> "[I]n an action of trespass, he has the right to recover the value of the coal after it is dug in the bank; or, he could recover the value of the coal at

> the mouth of the pit, less the cost of conveying it, after dug, from the mine to the mouth of the pit." 71 Ill. 405, 407.

Thirty some years later, in the case of *McGuire* v. *Boyd Coal & Coke Co.* (1908), 236 Ill. 69, 86 N.E. 174, there was a knowing and intentional taking of coal. The parties (and the supreme court) agreed that the measure of damages was the value of the coal at the mouth of the pit, less the cost of conveying it there from the place where mined. Defendant argued that its costs should include all work connected with the production of the coal, except the actual cost of separating it from its natural position by the miner, and costs of constructing the mine, sinking the shaft, and of permanent structures. The supreme court held that the trespasser was not entitled to the additional costs. (However, it does appear that the defendant was allowed a deduction for impurities extracted from the mined coal. Here, Zeigler argues for such a deduction also.)

A variation on this measure is found in *Smothers* v. *Cosgrove-Meehan Coal Co.* (1932), 264 Ill. App. 488. There, the value of the coal to the owner was established as its market value f.o.b. the mine. The trespasser was entitled to its costs of loading the coal upon cars, in addition to the costs of transporting it to the mouth of the pit. This rule had earlier been applied in *Donovan* v. *Consolidated Coal Co.* (1900), 187 Ill. 28, 58 N.E. 290.

It can readily be seen that we can value the coal at any point in the marketing chain, so long as we give credit to the trespasser for transporting it there. This springs from the notion that we cannot value something without an appropriate market; and to speak of value without a market is impossible, at least as far as this case is concerned. Zeigler argues that the measure of damages should be determined under the royalty method. This method gives the wronged owner only the royalty for coal prevailing in his field or vicinity. In our case, Zeigler's testimony is that this would be 15 cents per ton. Other jurisdictions have used this method, especially

when the owner was not developing the mineral himself. However, this method of valuation finds no support in Illinois law.

• 4 We conclude that *Lambach* changed the law of damages recoverable from a *good faith* trespasser to conform to the general rule: That is, the good faith trespasser is allowed to deduct his production costs from the value of the coal as measured at the mouth of the pit.

(Since the trespasser in *Lambach* was held to be in good faith, we cannot say that the rule as to wilful trespassers has been brought into conformity with the general rule. The old Illinois rule treats a wilful trespasser more leniently than does the general rule. In Illinois, the wilful trespasser receives credit for the costs of moving the coal to the pit mouth, or other place. Under the general rule, the wilful trespasser receives no such credit.)

GOOD FAITH OR WILFUL TRESPASSER

This issue arose when the Dethloffs presented a motion *in limine* to preclude evidence on Zeigler's cost of operation of the mine; on the cost, purchase price or consideration for the plaintiffs' property; on payments made or tendered to the plaintiffs or their predecessors by the defendant; and on the provisions of the lease which formerly existed. The trial court granted the motion, making clear that it was ruling as a matter of law that defendant could not show its good faith.

There is no national consensus as to what constitutes good faith in this context. And the Illinois cases seem reluctant to adjudge a trespasser in good faith.

In *Donovan* v. *Consolidated Coal Co.* (1900), 187 Ill. 28, 58 N.E. 290, the issue of good faith was presented by appellant, who owned a tract with a coal mine. He also owned the surface of an adjoining tract, but appellee owned the coal under the surface. Appellant entered into a lease, granting the right to mine the coal under both tracts. Appellant's sublessee mined appellee's coal,

and an action was brought for trespass. The supreme court held the appellant was liable for the trespass. The measure of damages was found to be the full value of the coal at the mouth of the pit less the cost of transporting it from the place where it was dug to the mouth, and if it was loaded upon railroad cars, less the loading costs.

Appellant argued that this measure was not applicable to the case because it was not a wilful trespasser, and that the proper measure would be the value of the coal as it was before it was mined. Appellant pointed to the evidence that he had never had possession of appellee's coal, and never claimed title to it; that he had a large plat in his office; that in making the contract he failed to remember that the coal had been sold to plaintiff; that he could give no other explanation of his contract; and never intended to dispose of the plaintiff's coal.

The supreme court rejected appellant's argument, holding that negligence or innocent mistake on the part of the trespasser does not bring him within the good faith rule.

As noted under the preceding issue, *Lambach* adopted *Guffey* v. *Smith* (1915), 237 U.S. 101, 59 L. Ed. 856, 35 S. Ct. 526. as stating the distinction between the two classes of trespassers. Under *Guffey,* a good faith trespasser apparently must have an honest, *though mistaken,* belief that he has acquired a perfect right to take and dispose of the mineral. One may become a wilful trespasser by proceeding in the face of actual notice of an adverse claim.

Good faith has been defined as something more than the trespasser's assertion of a colorable claim to the minerals. (*United States* v. *Wyoming* (1947), 331 U.S. 440, 91 L. Ed. 1590, 67 S. Ct. 1319, *rehearing denied* (1947), 332 U.S. 787, 92 L. Ed. 370, 68 S. Ct. 37.) Good faith requires that the taking be without culpable negligence or a wilful disregard of the rights of others and in the honest and reasonable belief that it was rightful. (*Miller* v. *Tidal Oil Co.* (1932), 161 Okla. 155, 17 P.2d 967.)

The Kentucky Supreme Court has listed four factors to be considered as evidencing good faith:

(1) At least reasonable doubt of the other party's exclusive or dominant right;

(2) That the trespasser acted upon advice of reputable counsel;

(3) That a court of competent jurisdiction had rendered a favorable judgment upon identical or similar issues;

(4) Whether delay would endanger loss, and urgent action would seem to be called for, recognizing that a distinction is to be made between land producing mineral ores and land producing fugacious minerals (oil). *Swiss Oil Corp.* v. *Hupp* (1934), 253 Ky. 552, 69 S.W.2d 1037.

That court also noted that the test of good faith is not the trespasser's violation of the law in light of the maxim that every man knows the law, but is his sincerity and his actual intention at the time. And the Kentucky Supreme Court has also said that the mere fact of notice of an adverse claim (or even the pendency of a suit asserting an adverse claim) would not be conclusive on the question that a claimant had not acted in good faith, because he might honestly be of the opinion that his contention was right. *Loeb* v. *Conley* (1914), 160 Ky. 91, 169 S.W. 575.

The facts relied on by Zeigler to justify its trespass are that it acted under the lease, that its own officers and independent counsel considered their title to be good, and that their development of the coal was economically necessary. But on the other side of the coin, defendant had some five or six years after receiving notice of plaintiffs' adverse claim during which it could have obtained a declaration of rights under the lease. The question of good faith here was a very crucial issue and—in our view—a factual determination too illusive to be decided as a matter of law. We conclude that the trial court was unwarranted in invading the jury's domain.

POTPOURRI

A. VENUE

Turning now to the lesser issues, Zeigler argues that its motion for change of venue was improperly denied because it could not receive a fair trial in Douglas County. Defendant points to its 200-plus affidavits and says that reasons for prejudice are clear from local newspaper coverage regarding rulings of the circuit court, the fact that in prior years defendant and some county residents had disputes over consideration for leasing rights, and that there had been efforts to organize residents of the county to negotiate lease rights with defendant.

Since the venue question was presented after plaintiff's declaratory relief was granted, it comes too late. Section 3 of the venue act (Ill.Rev.Stat. 1975, ch. 146, par. 3; now Ill. Rev. Stat. 1977, ch. 110, par. 503) provides:

> "*Every application* for a change of venue by a party or his attorney shall be by petition, setting forth the cause of the application and praying a change of venue, which petition shall be verified by the affidavit of the applicant. A petition for change of venue shall not be granted unless it is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case, provided that if any grounds for such change of venue occurs thereafter, a petition for change of venue may be presented based upon such grounds." (Emphasis added.)

In *Gilliland,* the prejudice aleged was that of a judge. 365 N.E.2d 322. a petition for change of venue was filed after the trial judge had ruled on a motion to dismiss the complaint. The supreme court held that denial of the late petition for change of venue was proper, and cited section 3 of the venue act.

In *Gilliland,* the prejudice alleged was that of a judge. In our case, the inhabitants of the county are said to be biased. However, the language of section 3 refers to "[e]very application." Furthermore, section 1 provides in part:

> "A change of venue in any civil action may be had in the following situations:
>
> • • •
>
> (2) Where any party or his attorney fears that he will not receive a fair trial in the court in which the action is pending, *because the inhabitants of the county are or the judge is prejudiced* against him, or his attorney, or the adverse party has an undue influence over the minds of the inhabitants. In any such situation the venue shall not be changed except upon application, as provided in this Act, or by consent of the parties." (Emphasis added.) Ill. Rev. Stat. 1977, ch. 110, par. 501.

In reading section 3 together with section 1(2), it is clear that "[e]very application" is intended to cover applications alleging the prejudice of the inhabitants as well as those alleging the prejudice of the judge. The reason for the rule requiring an early filing of the application is the need for the orderly and efficient administration of trials. We perceive that the legislature intended, by means of section 3, to require that any application for change of venue be before the trial judge early in the proceedings so as to permit a proper scheduling of the case. Any other reading of section 3 would permit its use as a weapon for the dilatory litigant, and we do not see this as the purpose intended.

• 5 Our holding on the venue issue is that an application for change of venue premised upon the prejudice of the inhabitants of a county is not timely filed if the trial or hearing begins and the judge has ruled on any substantial issue.

We find that there is an alternate basis for affirming the trial judge on this issue.

• 6 There was extensive voir dire examination in the case at bench and the trial court granted defendant extra peremptory challenges. We especially note that Zeigler used only seven of its eight peremptory challenges. *Corbetta Construction Co.* v. *Lake County Public Building Com.* (1978), 64 Ill. App. 3d 313, 381 N.E.2d 758, holds that where a party does not exhaust peremptory challenges while seeking jurors acceptable to it, there is no abuse of discretion in denying a petition for change of venue.

The trial court heard the voir dire examination, and found no prejudice existing in the jurors who were selected. This court should not reverse unless the trial court abused its discretion. *Gouker* v. *Winnebago County Board of Supervisors* (1967), 37 Ill. 2d 473, 228 N.E.2d 881.

No abuse of discretion shown.

B. EVIDENTIARY RULINGS

Defendant turns our attention now from the larger issues to the smaller.

• 7 First, error is claimed because during opening argument Dethloffs' attorney commented that the sale price for coal at the mine approached $20 per ton. Defendant attacks not the $20 figure, but the reference to a sales price. Zeigler contends that the possible measures of value are value of the coal at the mouth of the pit, or leasehold value, or profit and loss experience of defendant. We see no error in assuming that the value of coal taken by a trespasser is the price obtained by the trespasser for that coal at the mine, less the credits allowed by law, which is essentially what counsel was saying. No error.

• 8 Defendant next claims error because Zeigler's computer printout of its business records showing prices received for coal from the mine was received in evidence. The objection at trial was that the price was not shown to be the price at the mouth of the pit. This exhibit was described by Mr. Corman, Zeigler's vice president and comptroller, as a 12-page sales register for the Murdock Mine, one for each month of calendar year 1976. It shows total tonnage sold and the total charge to customers monthly tonnage and charges, differentiates between raw and washed coal, and shows a current or prevailing price figure. This was a relevant exhibit. No error.

• 9 Defendant objects to admission of the deposition of Helfinstine which concerned tests made under his supervision and control in 1967 and 1968 and which established the specific gravity of coal from the Murdock Mine. Defendant's specific objection at trial was that the tests were not shown to have been made under Helfinstine's supervision and control. The trial court ruled that while some tests were not so performed, the deposition showed that the tests at issue were made under his supervision and control. The record also discloses that Helfinstine was a public official and that the records were maintained in connection with his duties. The evidence was properly admitted. *People ex rel. Wenzel* v. *Chicago & North Western Ry. Co.* (1963), 28 Ill. 2d 205, 190 N.E.2d 780.

Next, defendant alleges that the trial court should have precluded plaintiffs' impeachment of witness Corman. Mr. Corman testified on direct examination that the cost of loading and hauling coal to the mouth of the mine was $1.317 per ton. On cross-examination, plaintiffs' counsel read from a deposition where Corman had given the cost as $1.038 per ton. He said at trial that the $1.317 figure includes costs for a conveyor, but that the $1.038 figure did not. However, the answer given by Corman in the deposition, that costs were $1.038, includes the cost of the conveyor. The deposition was impeaching. No error.

C. PRECLUDED EVIDENCE OF VALUE

The coal company was precluded from offering testimony of witnesses Hill and Rogers as to the crushing and washing of coal after it reached the mouth of the mine, but before it went to customers. Rogers said that in his expert opinion the coal would have no value at the mouth of the mine to its customers before it passed through a crusher.

• 10 Although we disagree with such view that the coal had no value at the mouth of the mine, we likewise disagree with the Dethloffs that Zeigler is not entitled to credit for enhancement of the coal. Economic reality tells us that no one is standing at the mouth of the mine seeking to purchase the coal. Therefore, there is no market at that point and we are unable to assign a value to the coal. As we have heretofore pointed out, the measure of damages is for value *in situ,* but since we can't measure value there, courts have hit upon evaluating at the mouth of the mine. (If ever coal was marketed from the mouth, it is no longer.) Accordingly, defendant should recover cost for loading and hauling to the mouth, as has always been allowed. In addition, defendant should receive credit for the steps in preparing the coal to the state where it becomes coal f.o.b. the mine. Especially is this so where, as here, plaintiffs are relying on defendant's sales price for valuation.

• 11 Defendant's argument that evidence of its costs of mining should have been admitted stands on a different footing. Defendant argues that had it not mined plaintiffs' coal, it would not have incurred these costs. True—but if that were the case, then defendant would not have been a trespasser, either. Here again, the good faith/wilful trespasser issue is crucial. The rule of damages does not allow a wilful trespasser to deduct mining costs, but costs of mining are quite relevant in the case of a good-faith trespasser.

D. STATEMENT BY PLAINTIFFS' ATTORNEY

As plaintiffs' counsel was about to use a deposition to impeach George Seaman, a registered surveyor employed by Zeigler, defendant's counsel objected. Plaintiffs' counsel stated:

> "This is a witness under the control of the Defendant. He's an employee of the Defendant. A person who made measurements and who made responses to questions concerning measurements and now he is starting to allude. He's making a statement different from what he made before."

• 12 The trial court denied defendant's motion for mistrial but ruled that the witness could not be impeached. Error, if any, did not affect the verdict and is governed by the harmless error doctrine. *Lawson* v. *G.D. Searle & Co.* (1976), 64 Ill. 2d 543, 356 N.E.2d 779.

E. JURY INSTRUCTIONS

Defendant complains of the trial court's rulings on some 15 of the tendered instructions. Since 12 of those instructions go to measure of damages, definitions, issues, or burdens of proof, we do not need to minutely deal with them. Our substantive treatments in this opinion clarify how the jury is to be instructed in those matters in the event of a retrial of this cause.

We are prompted, however, to comment upon the other three of those instructions. Plaintiffs' #5 and defendant's #17 and #18.

• 13, 14 Plaintiffs' #5. Defendant contends it was error to give this one because it told the jury, "The Court had already entered a judgment that the defendant is liable to the plaintiffs for the mining of coal from the plaintiffs' property" and characterized the lawsuit as "• • • an action for trespass to land." Zeigler's tendered instruction advised the jury that plaintiffs sought recovery for trespass by defendant and told the jury they were to decide

the amount of "just compensation to be paid plaintiffs." We cannot see the giving of plaintiffs' instruction as error, and defendant's instruction is no more accurate or less argumentative. Furthermore, the injection into the case of the eminent domain concept of "just compensation" would not have been proper.

Defendant's #17 and #18. Both recited that a verdict must be unanimous. Both were denied. The pertinent part of Illinois Pattern Instructions, Civil, No. 45.01 (2d ed. 1971) (hereinafter IPI) reads:

> "Forms of verdict are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate form of verdict and return it into court. The verdict should be signed by each of you. You should not write or mark upon this or any of the other instructions given you by the court."

There is nothing in this—or any other—IPI Civil instructions concerning unanimity of verdicts. No. 17 adds the language: "In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous." No. 18 adds to the IPI form only: "Your verdict must be unanimous." The court refused #17 and #18 and gave the plaintiffs' #7 in IPI form.

• 15 Not only was the verdict signed by each member of the jury, but the record reflects that it was also polled. While we consider it a better practice to have the jury instructed that their verdict must be unanimous—and hope that the IPI Civil instruction will be amended accordingly—there was no error here.

F. VERDICT BY PASSION OR PREJUDICE

There is no basis for claiming that the verdict was the result of passion or prejudice on the jury's part. The trier of fact arrived at a simple arithmetic figure, based on the evidence. Coal was taken. Zeigler was liable. Given the terms of the trial court's charge, the jurors had little latitude. Error, if any, was in the charge.

G. LACHES, ESTOPPEL, AND ACCORD AND SATISFACTION

The trial court, in the declaratory judgment on count III (term of lease), ruled that the laches, estoppel, and accord and satisfaction had not been proved. Defendant claims that these defenses are different as they pertain to the trespass count, yet any such differences are not pointed out in its briefs. We do not perceive the distinction.

• 16 Zeigler points out that it expended large sums of money in developing its mine over many years and claims that the Dethloffs simply stood by until their coal was mined. As we view the case, defendant had notice of an adverse claim long before it entered plaintiffs' land. Plaintiffs sued soon after the entry. Laches, of course, akin to a statute of limitations, would relate to the time element. We have here only a couple of months between entry and suit. This clearly is not the type of case for which estoppel is intended: "A" builds a garage; "B" watches without protest, knowing that "A" is mistaken in building on "B's" land; "B" claims the finished product. Laches and estoppel simply don't apply.

• 17 The accord and satisfaction is said to arise from plaintiffs' retention of royalty checks issued in early 1976. Mr. Dethloff, however, asserted that he retained these checks only to later prove the quantity of coal taken, and the fact that they were never cashed or deposited appears to us to cause this theory to dissipate.

H. DIRECTED VERDICT DENIED

• 18 Defendant argues that a verdict should have been directed because plaintiffs failed to introduce any evidence of the value of the coal at the mouth of the pit. But even if there were an absolute failure of proof on the measure of damages, defendant would not be entitled to a directed verdict in a trespass case, since the law implies at least nominal damages for the wrong. Addi-

tionally, there is an alternate rule of valuation from the *Donovan* and *Smothers* cases: value of the coal f.o.b. the mine. Plaintiffs proved this measure when they introduced the defendant's sales records for coal f.o.b. the mine.

I. SUMMARY JUDGMENT ON PUNITIVE DAMAGES COUNT

• 19 We conclude that the trial court correctly precluded the jury from considering the punitive damages alleged in count II. We so hold for three basic reasons:

First, Zeigler's conduct was not oppressive or vindictive, even though it may have been a wilful disregard of the Dethloff's rights. This is highlighted by the fact that defendant kept accurate records of what it took from plaintiffs' land (although the records are apparently required by law). The fact that a defendant displayed a conscious disregard or indifference to the rights of a plaintiff should not be enough here, because oppression must also be present—or other circumstances which can be said to equate oppression. In *Roark* v. *Musgrave* (1976), 41 Ill. App. 3d 1008, 355 N.E.2d 91, punitive damages were awarded, in addition to the value of timber cut. But there, the scenic beauty of land bought for recreational use was impaired. In *Miller* v. *Simon* (1968), 100 Ill. App. 2d 6, 241 N.E.2d 697, realtors had stripped topsoil from two lots owned by plaintiff, and had dumped gravel on them, all in furtherance of developing the 300 surrounding lots which they owned. The court termed the actions of defendant in response to protests by plaintiffs as defiant, irresponsible, and aggravating. Punitive damages were allowed.

Second, the measure of damages in cases of this nature does more than simply compensate plaintiffs for any loss. In fact, there is inherently involved a punitive aspect already. (See Annot., 21 A.L.R.2d 380, 382 (1952). The economic value of this coal to these plaintiffs, who

could not themselves mine it, was the value of the right to mine, or the 15 cents per ton royalty.

Third, punitive damages are not favored in the law, and their application is to be carefully watched. In *Knierim* v. *Izzo* (1961), 22 Ill.2d 73, 174 N.E.2d 157, the supreme court decided that an action is maintainable by the widow against the murderer of her husband for great mental anguish that resulted from the defendant's threat to her that he would kill her husband and the fulfillment of the threat. The supreme court said:

> "Whether punitive damages may be assessed in a particular case is properly a question of law. [Citation.] Generally such damages may be recovered in cases where the wrongful act complained of is characterized by wantonness, malice, oppression or circumstances of aggravation. [Citation.] The alleged conduct of the defendant in intentionally causing the severe emotional disturbance is characterized by these elements. Indeed it is the outrageous nature of his conduct that forms the basis for the action.
>
> We believe, nevertheless, that punitive damages cannot be sanctioned as an additional recovery in such an action. Since the outrageous quality of the defendant's conduct forms the basis of the action, the rendition of compensatory damages will be sufficiently punitive." 22 Ill. 2d 73, 87-88, 174 N.E.2d 157, 165.

Plaintiffs have shown nothing more malicious, oppressive, or aggravating than the action of trespass contemplates, and punitive damages are not warranted.

CONCLUSION

Zeigler was entitled to have the issue of good faith submitted to the jury. Because the trial court precluded this, a new trial is necessary. However, we are graphically aware of the weeks devoted to the trial of this cause, the plethora of pleadings and motions involved, the countless legal and judicial manhours devoted, and the vast

financial expense entailed. In order to hopefully avoid a replay of such efforts, we would prefer to utilize a procedural device found in *Smothers* v. *Cosgrove-Meehan Coal Co.* (1932), 264 Ill. App. 488. We believe that one reasonable approximation of a fair verdict can be arrived at by multiplying the tonnage of 215,247 by the net profit of $7.31, equaling $1,573,455.57. (The tonnage represents a net figure after deducting impurities. Counsel for plaintiffs argued to the jury that $17.91 was the average price per ton realized by defendant. Defendant claims that its cost was $10.60 per ton.)

The bottom line is this: If plaintiffs will agree to remittitur within 28 days, in the office of the clerk of this court, the judgment will be affirmed in the amount of $1,573,455.57. Otherwise, the cause is reversed and remanded for a new trial on count I in a manner consistent with this opinion.

(Caveat: By positing the facts upon which the suggested verdict is based, this court expresses no view as to the validity of the facts, or their relevance in any further proceedings.)

Affirmed upon remittitur; otherwise, reversed and remanded for a new trial.

REARDON, *P.J.*, and TRAPP, *J.*, *concur.*

SUPPLEMENTAL OPINION

MR. JUSTICE MILLS delivered the opinion of the court:

The remittitur reducing the amount of the judgment to $1,573,455.57 having been filed in this court on March 14, 1979, the judgment of the circuit court as modified is affirmed.

Judgment affirmed.

REARDON, *P.J.*, and TRAPP, *J.*, *concur.*

APPENDIX B

(OPINION OF SUPREME COURT OF ILLINOIS)

(No. 51950, 51953 cons.—Appellate court affirmed in part and reversed in part; circuit court affirmed in part and reversed in part; cause remanded.)

PHILLIP A. DETHLOFF *et al.*,

Appellants,

vs.

ZEIGLER COAL CO.,

Appellee.

Opinion filed October 17, 1980.—Rehearing denied November 26, 1980.

1. MINES AND MINERALS—*the legal principles applicable to oil and gas leases have been applied to similar agreements for coal mining.* The body of law and rules of construction used to interpret oil and gas leasing agreements have also been applied to agreements of a similar nature for coal mining. (P. 399.)

2. MINES AND MINERALS—*a coal-mining lease expires at the end of its fixed term if mining is never commenced, even though other provisions extend the term if mining has commenced and continues to be profitable.* Where a coal-mining lease is for a fixed term and contains a "thereafter" clause extending the lessee's right to mine for an indefinite duration beyond the term, such as for so long as coal can be economically mined, the indefinite-duration clause does not come into effect unless production operations have begun within the primary term or period of the lease, and if no production or significant mining operations are initiated on the subject land within that period, the lease automatically terminates at the end of the fixed term. (Pp. 399-400.)

3. MINES AND MINERALS—*mining leases with a primary term requiring exploration or development and*

which may be extended thereafter are construed as conveying a freehold estate. Mining leases which contain a primary term requring exploration or development within a stated period, followed by a "thereafter" clause pursuant to which the lessee's term may be extended, are to be construed as conveying to the lessee a freehold estate or interest, in the sense that, unlike an estate strictly for a term of years, the lessee's right to mine under certain circumstances may continue for a indefinite period. (P. 401.)

4. MINES AND MINERALS—*a lessor need take no affirmative action to extinguish a lessee's interest in a mining lease where the initial term has expired and no production has been commenced—conditions subsequent.* Mining leases which are for a fixed initial term and "thereafter" for as long as mining continues or is profitable have been construed to terminate after the expiration of the fixed term if production is never commenced, and the fact that the lessee's interest in such a lease has been held to be a freehold estate does not mean that it is subject to a condition subsequent requiring the lessor to take any affirmative action to extinguish the lessee's interest after the initial term has expired because of nonproduction. (Pp. 403-05.)

5. MINES AND MINERALS—*a coal-mining lease cannot be regarded as a unitized lease or pooling agreement where it has no specific language so providing* A coal-mining lease cannot be regarded as a unitized lease, or a pooling agreement, whereby coal production on one or more parcels of land in the unit would satisfy the implied agreement to produce with respect to all of the other leased tracts, where the lease contains no specific language to that effect, even though there are vague references in the provision for the extension of the lease beyond the initial term referring to mining of other lands in the vicinity or in the block of leased coal. (Pp. 405-07.)

6. MINES AND MINERALS—*operating expenses are deducted from the damages owed by a good-faith tres-*

passer who mines and converts coal. One who in good faith trespasses and converts mined coal for his own use may set off certain operating expenses against the value of the coal converted. (P. 408.)

7. DAMAGES—*the amount of damages is a jury question, but whether the imposition of punitive damages is proper is a question of law.* While generally the amount of damages is a jury question, the issue of whether the circumstances in a particular case warrant the imposition of punitive damages is a question of law for the court. (P. 408.)

8. MINES AND MINERALS—*damages for bad-faith trespass in mining coal are punitive in nature and their applicability is a question of law.* Damages for bad-faith trespass to land by mining coal are punitive in nature, since no allowance is made for labor and operational expenses other than lifting costs, and a trial court does not err in treating the question of whether a defendant is a trespasser in good or bad faith as a question of law. (P. 408.)

9. MINES AND MINERALS—*when a trial court does not err in finding that trespass mining by a coal company was done in bad faith.* A trial court does not err in holding that trespass by a coal-mining company was undertaken in bad faith where the company is the lessee pursuant to a coal-mining agreement of the type which customarily terminates after its initial fixed term if mining has never been commenced, and the mining operations in question are undertaken after the lease has so terminated and with notice that the lessor considers the lease to be expired and has offered to renegotiate it, and where the lessee does not seek a determination of the parties' rights under the lease by filing a declaratory judgment or other action. (Pp. 408-09.)

10. MINES AND MINERALS—*the measure of damages for bad-faith trespass in mining coal is its market value, less lifting costs, without allowance for other ex-*

penses of production. The proper measure of damages for bad-faith trespass in mining is the market value of the coal, less the expenses of conveying or lifting the coal to the mouth of the mine, without allowance for other costs of production such as drilling and processing. (P. 410.)

11. MINES AND MINERALS—*damages for trespass in mining coal should not be based upon quantities of nonsaleable material brought up with the coal.* It is improper to calculate damages for trespass in mining coal by including quantities of nonsaleable materials brought to the surface of the mine along with the coal. (P. 410-11.)

12. MINES AND MINERALS—*the purpose of a severe measure of damages for trespass by mining coal in bad faith is to discourage this misconduct.* The measure of damages for trespass by mining coal that is done in bad faith makes allowance for the cost of lifting the coal to the mouth of the mine, but makes no other allowances for other costs of production, and the rationale of refusing to allow further deductions is to discourage this type of misconduct, for calculating damages by a method of valuation such as the royalty method might fully compensate the owner, but would furnish no reason for the converter to refrain from trespass and would allow him to profit by his own wrongdoing. (Pp. 411-12.)

13. MINES AND MINERALS—*when alleged failure to take steps to prevent trespassing mining operations does estop owners from bringing suit.* Plaintiffs who are landowners and lessors under an expired coal-mining lease are not estopped from bringing a trespass action against a coal company by their alleged failure to take steps to prevent trespassing coal-mining operations where they bring suit five months after mining begins, accept checks for royalty payments but hold them in a safety deposit box without cashing them, and have notified the trespassing former lessee that they consider the lease to be expired. (P. 412.)

14. VENUE—*a motion for change of venue is improper subsequent to a trial court's ruling on a declaratory judgment count of a complaint.* A motion for a change of venue that is presented to a trial court subsequent to its ruling in favor of the plaintiffs on a count of their complaint in which they seek a declaratory judgment is improper, since it occurs after the ruling has been made on a substantial issue. (P. 412.)

15. MINES AND MINERALS—*punitive damages are properly denied where plaintiff has been awarded damages for bad-faith trespass, which are by their nature punitive.* A trial court is correct in denying plaintiffs' claim for punitive damages where damages for bad-faith trespass in mining coal, which are by their very nature punitive, have already been awarded. (P. 412.)

CLARK, J., took no part.

UNDERWOOD and RYAN, JJ., concurring in part and dissenting in part.

Appellate citation: 69 Ill. App. 3d 133.

Appeal from the Appellate Court for the Fourth District; heard in that court on appeal from the Circuit Court of Douglas County, the Hon. James N. Sherrick, Judge, presiding.

Leonard M. Ring, of Chicago (Leonard M. King & Associates: Arnold F. Blockman and Brian L. McPheters, of Hatch, Nicol, Blockman & McPheters, of Champaign; and Raymond Lee, Jr., of Tuscola, of counsel), for appellants.

Craig & Craig, of Mattoon (John H. Armstrong and Richard F. Record, Jr., of counsel), Baker & McKenzie, of Chicago (Francis D. Morrissey, Edward J. Zulkey and George H. Olsen, of counsel), and Latchford, Rice & O'Brien, of Chicago (James B. Rice, of counsel), for appellee.

MR. JUSTICE WARD delivered the opinion of the court:

On June 29, 1976, Phillip and Dorothy Dethloff filed a complaint in the circuit court of Douglas County alleging that the defendant, the Zeigler Coal Company (Zeigler), had unlawfully entered the plaintiffs' land in January of 1976 and mined coal which it later converted. Counts I and II of the complaint asked for compensatory and punitive damages for trespass and conversion. Count III sought a declaratory judgment that the leasing agreement entered into by each party's predecessor in title and interest had expired by its terms on June 20, 1970. The trial court held in the plaintiffs' favor on count III but granted Zeigler's motion for summary judgment on count II on the issue of punitive damages. Count I was submitted to a jury, which returned a verdict of $4,019,867.08 in compensatory damages.

The appellate court affirmed. (69 Ill. App. 3d 133.) It judged, however, that the trial court's holding that the defendant was not, as a matter of law, a trespasser in good faith was an issue of fact which should have been submitted to the jury. The court reduced the judgment to $1,573,455.57, saying it did so to avoid the necessity of remanding the cause for a new trial. The plaintiffs consented to the remittitur. (See 73 Ill. 2d R. 366(b)(2)(ii).) The petitions for leave to appeal of the defendant and the plaintiffs were granted by us and the appeals consolidated. 73 Ill. 2d R. 315.

The predecessors of the parties in title and interest, that is, the original lessors and lessee, entered into a leasing agreement on June 20, 1945, whereby the lessee was given the right to mine all of the subsurface coal contained within the lessor's 40-acre tract of land located in Douglas County. This parcel was but one of many such properties in the area whose owners, through leasing agreements, had extended similar, if not identical, mining rights to those now held by Zeigler. The habendum clause of the lease here provided in part:

"This lease shall be and continue for the term of twenty-five (25) years from and after the date hereof, and for so long thereafter as shall in the opinion of Lessee be necessary to mine and remove all of the coal in and under the above described leased lands and other lands in the vicinity, thereof, or included in the block of leased coal hereinafter referred to, unless this lease is sooner terminated as hereinafter provided and unless in the opinion of the Lessee the coal which can be economically mined in accordance with good and accepted mining practices from said lands shall be sooner exhausted."

In October of 1969, the Dethloffs, the plaintiffs in this case, acquired their 40-acre tract from Mr. and Mrs. Joseph Taylor. A title search revealed the existence of the coal-leasing rights held by Zeigler. The defendant was not informed of the conveyance to the plaintiffs, and it continued to forward the annual rental fee of $80 to the Taylors. It was only when the Taylors returned the rental payment for 1971 that Zeigler became aware that the Dethloffs were the new owners of the tract.

When the defendant tendered this rental payment to the plaintiffs in October of 1971 their attorney wrote to the defendant stating that the lease had expired according to its own terms on June 20, 1970. The letter did indicate, however, that the Dethloffs were interested in renegotiating a new lease and, in particular, in renegotiating the royalty payment provision. During the 26-year period from June 20, 1945, until October of 1971 no coal had been taken or mined from the plaintiffs property by the defendant or its predecessor in interest.

Upon rejection of the rental payment by the plaintiffs Zeigler said it would exercise its right under the lease to withhold further payments of rent pending resolution of any disputed questions as to the rights of the parties. The defendant did not respond, however, to the plaintiffs' repeated overtures to renegotiate the lease. Negotiations were again attempted in 1975 by the plaintiffs after they

became aware that Zeigler was planning to commence mining operations on the land either that fall or in the spring of 1976. Mining operations were commenced in January 1976, almost 31 years after the leasing agreement was executed.

A check for the royalty payment for coal mined in January and February was delivered to the plaintiffs in March of that year. The Dethloffs reacted with a demand that Zeigler discontinue operations on their land. Though the Dethloffs filed suit that June, defendant continued its mining operation until December of 1976, when all of the coal that could be subterraneanly mined from the plaintiff's land had been removed. The record shows that royalty checks delivered every month to the plaintiffs through December 1976 were not cashed but were retained by them in a safety deposit box as evidence of the amount of coal mined each month.

As the parties generally agree, the central question is the interpretation to be given to the mining lease. More specifically, the issue is whether the lease automatically expired by its provision on June 20, 1970, after the 25-year term had expired, or whether it remained in effect until December of 1976, when defendant completed the removal of all of the subsurface coal from the plaintiffs' property.

Though the legal and economic interests as well as exploratory and extraction techniques involved in hard-mineral and coal production differ from those pertaining to fugacious substances such as oil and gas (see, *e.g.*, Norvell, *The Coal and Lignite Lease Compared to the Oil and Gas Lease,* 31 Ark. L. Rev. 420 (1977)), coal-mining leases closely resemble oil and gas leasing agreements. As a result, the body of the law and rules of construction used to interpret the latter instruments have been applied to coal-mining leases like the one here. See *Fremont Lumber Co.* v. *Starrell Petroleum Co.* (1961), 228 Or. 180, 364 P.2d 773; Fletcher, *Mining Leases and Gas Leases—Different Breeds,* 24 Rocky Mtn. Min. L. Inst. 309 (1978).

The habendum clause in the lease executed on June 20, 1945, is of the standard form found in oil and gas leases. It provides that the agreement to mine coal shall be in effect for "the *term* of twenty-five (25) years from and after the date hereof [June 20, 1945],*and for so long thereafter* as shall in the opinion of Lessee be necessary to mine and remove all the coal in and under the above described leased lands ***." (Emphasis added.)

The purpose of the habendum clause in a lease is to define and measure the duration of the lessee's interest in the property to be developed. (See H. Williams, Oil and Gas sec. 604 (1977); 2 W. Summers, Oil and Gas secs. 281 through 307 (1959). Typically, the clause is in two parts. The first part, or primary term, defines the time period within which production or removal must begin. The second part, or "thereafter" clause, extends the lessee's right to mine for an indefinite duration beyond the term of years, usually for as long as it is profitable to continue production or, in the terms of this lease, as long as "the coal *** can be economically mined in accordance with good and accepted mining practices ***." (See *Freeland* v. *Edwards* (1957), 11 Ill. 2d 395.) The "indefinite duration" clause does not come into effect, however, until production operations have begun within the primary term or period of the lease. Habendum clauses of this type generally have been interpreted as vesting the lessee with an interest subject to this special limitation that mining operations must commence within the primary period of the lease. Thus, if no production or significant mining operations have been initiated within the primary period the lease automatically terminates at the end of that period or term. (See *Fremont Lumber Co.* v. *Starrell Petroleum Co.* (1961), 228 Or. 180, 364 P.2d 773; *Brown* v. *Haight* (1969), 435 Pa. 12, 255 A.2d 508.) See also *Guffey* v. *Smith* (1915), 237 U.S. 101, 59 L. Ed. 856, 35 S. Ct. 526; H. Williams, Oil and Gas sec. 604 (1977).

Both the trial and appellate courts held that Zeigler's failure to mine coal from the Dethloffs' property within

the lease's primary term of 25 years resulted in the automatic forfeiture or termination of all of the defendant's mining rights and that it was liable for trespass and conversion.

The defendant presents several contentions basically to the effect that the interpretation given the lease by the trial and appellate courts was erroneous. The company first submits that the leasing agreement did not convey a leasehold estate subject to a special limitation but instead granted "a freehold estate or interest" subject to a condition subsequent. Under this theory the lessee's interest in mining the coal would not terminate automatically upon a breach by it but only when the lessor had taken affirmative action by either demanding performance by the defendant or by extinguishing its interest through a forfeiture proceeding. Since no such action was taken by the Dethloffs, Zeigler contends that its mining rights under the lease continued until all the coal was removed with the plaintiffs' land in December of 1976.

This court has uniformly held that mining leases which contain a primary term requiring exploration or development within a stated period, followed by a "thereafter" clause, are to be construed as conveying a freehold estate or interest, in the sense that unlike an estate strictly for a term of years the lessee's right to mine under certain circumstances may continue for an indefinite period.(See *Jilek* v. *Chicago, Wilmington & Franklin Coal Co.* (1943), 382 Ill. 241; *Daughetee* v. *Ohio Oil Co.* (1914), 263 Ill. 518; *Poe* v. *Ulrey* (1908), 233 Ill. 56; see also *Fowler* v. *Marion Pittsburgh Coal Co.* (1924), 315 Ill. 312; *Dabney* v. *Edwards* (1935), 5 Cal. 2d 1, 53 P.2d 962.) These cited holdings do not support a conclusion, as the defendant contends, that such freehold interest are always subject to a condition subsequent.

As previously described, this mining lease and its habendum clause are typical of those leases which require production within the primary term in order for the lessee's

rights to be extended beyond the initial period or term. In the Williams treatise on oil and gas law these leases are discussed:

> "A vast majority of the courts have construed such habendum clauses as conveying an interest subject to a special limitation rather than as conveying an interest subject to a condition, power of termination or right of reentry. *** The consequences of this conceptual classification of the habendum clause as a clause of limitation is that lack of production at the end of the primary period or cessation of production after the expiration of the primary term results in an automatic termination of the lessee's interest. The language of this clause clearly supports this construction. ***
>
> The primary purpose of the lease clearly is to obtain production. It would, therefore, seem in accord with this objective as embodied in the language of the habendum clause that the duration of the lessee's interest, after a period of exploration, be limited by the continued use for the purpose for which that interest was created. While the courts may be generally opposed to a construction that results in an automatic termination, the policy behind this rule is not applicable to an oil and gas lease. The special limitation placed on the duration of the lessee's interest is not a frivolous condition or a whimsical limitation of the use of the interest." H. Williams, Oil and Gas sec. 604 (1977).

See also *Fremont Lumber Co.* v. *Starrell Petroleum Co.* (1961), 228 Or. 180, 364 P.2d 773; *King* v. *Garcia* (Tex. Civ. App. 1941), 152 S.W.2d 918, *rev'd on other grounds* (1942), 139 Tex. 578, 164 S.W.2d 509; Fletcher, *Mining Leases and Oil and Gas Leases—Different Breeds,* 24 Rocky Mtn. Min. L. Inst. 309 (1978); Ennis, *Drafting Leases and Other Documents Relating to Development of Western Coal,* 21 Rocky Mtn. Min. L. Inst. 93 (1976).

To counter the claim of an automatic termination of its rights the defendant points out that the agreement contains a forfeiture clause, which states:

> "It is further agreed that if at any time Lessee shall be in default in the performance of any of the covenants and agreements herein contained by it to be performed, including default in payment of any sum or sums due for rent or royalty, as aforesaid, and shall continue in such default for the period of thirty (30) days after written demand served upon it by the Lessor, the Lessee shall forfeit all right to mine or otherwise hold and enjoy said leased lands, and after such default and demand and the failure to remedy the same, as aforesaid, the Lessor may enter into the exclusive possession thereof and hold the same free and clear of every and all claims of the Lessee ***."

Zeigler says this supports its argument that the lease is not subject to a special limitation, that is, to an automatic termination, but instead is subject to a condition subsequent that requires the lessor to first demand performance and reenter in order to terminate the lessee's rights. The "covenants and agreements" in the lease, to which this forfeiture clause applies in the event of default by the lessee, are the covenants to pay annual rent of $1 per acre for the first year of the lease and $2 per acre for the years thereafter; the covenant to pay royalties of $.05 per ton of "good, clean, washed merchantable mine run coal"; and the implied undertaking or covenant to produce. Zeigler contends that the breach of any of these covenants or agreements required at a minimum that the plaintiff, in order to satisfy the condition subsequent, first demand performance before the defendant's rights were forfeited. Since no such demand or attempt to reenter the property was made by the plaintiffs the defendant contends that the condition subsequent was not met, and the lease did not terminate automatically and thus remained

in effect until December of 1976 when all the coal had been removed from the Dethloffs' land.

This argument fails because, *inter alia,* it does not even relate to the facts here. First, the covenant to pay rent was never breached during the primary period of the lease. Nor had the defendant violated the covenant to pay royalties, since production did not commence until 6 years after the lease had automatically terminated. Also, the defendant could have satisfied the implied covenant to produce up until the last day of the primary term on June 20, 1970, and thus the Dethloffs would not have been within their rights as lessors to demand performance by production before that date. When the 25 years had elapsed, however, the the plaintiffs certainly were no longer required to demand production, since the lease had already terminated without any requirement of notice to the defendant.

The habendum clause containing the described special limitation and the forfeiture provision imposing the condition subsequent were both part of the lease when the agreement was entered into on June 20, 1945. Had production begun within the primary term but been thereafter halted the lease would not have terminated automatically, but, instead, the plaintiffs would have been required under the terms of the lease to demand performance, and if the demand were to no avail, then to reenter the property before the defendant's rights would have been extinguished. There was no production here in the primary term, and therefore no obligation to demand or reenter was imposed upon the Dethloffs either before or after June 20, 1970.

Also, to support its argument that the lease is subject only to a condition subsequent and not to an automatic termination Zeigler claims that the lease is of the "drill or pay" type. It says this type is in contrast to one that contains an "unless" clause, that is, one in which the lessee's rights are terminated *unless* production is begun. A "drill or pay" provision requires the lessee to produce

or, as an alternative, to pay rent. A provision of this type allows the lessee to pay rents as a device to keep the lease in effect though the primary period has expired. (See *Fremont Lumber Co.* v. *Starrell Petroleum Co.* (1961), 228 Or. 180, 364 P.2d 773; 2 W. Summers, Oil and Gas secs. 331 through 351 (1959); H. Williams, Oil and Gas secs. 601.5, 605 (1977).) A breach of either the provision to drill or to pay rent will not terminate the lease automatically but is considered to add a condition subsequent to the lease, thus requiring the lessor to take affirmative action in order to terminate the lessee's rights. In the lease here the only covenants pertaining to rent are those requiring payment of the annual rental fee, which is to be credited against any subsequent royalty payments made during that year. This, however, plainly does not allow the payment of rent as a device to extend the duration of the lease beyond the term of 25 years.

Responding to the plaintiffs' argument that Zeigler had an implied obligation to produce, the defendant says that that obligation was satisfied when mining operations were begun on adjacent lands shortly after the lease was entered into. This met, the defendant says, any requirement that production begin within 25 years. To support this contention the defendant cites language to the habendum clause which grants the lessee a right "to mine and remove all of the coal in and under the above described leased lands *and other lands in the vicinity thereof,* or included in *the block of leased coal* hereinafter referred to * * *." (Emphasis added.) By specifically referring to lands in the "vicinity" or in the "block of leased coal," the defendant argues that once production began on the plaintiffs' 40 acres or in lands surrounding this property the implied covenant to produce within the term of 25 years would be satisfied. That would permit, it says, the continuation of mining operations for an indefinite time, or, as here, until all the plaintiffs' coal was mined.

In essence, the defendant seeks to have this clause of the lease regarded as a unitization or pooling agreement.

In *Southland Royalty Co.* v. *Humble Oil & Refining Co.* (1952), 151 Tex. 324, 328-29, 249 S.W.2d 914, 916, such agreements were described:

> "Some of the legal consequences of a unitized lease as between the lessors on the one hand and the lessees on the other, in the absence of express agreement to the contrary, are as follows: the life of the lease is extended as to all included tracts beyond the primary term and for as long as oil, gas or other minerals are produced from any one of the tracts included in the lease; the commencement of a well on any one of the tracts operates to excuse the payment of delay rentals on all included tracts for the period stated in the lease; production from a well on any one of the tracts relieves the obligation to pay delay rentals, during production, on all included tracts; *the lessee is relieved of the usual obligation of an implied covenant for reasonable development of each tract separately* * * *. As between the lessors themselves, each relinquishes his right to have his own tract separately developed * * *. *In short, the parties by the execution of a unitized lease agree that production of oil or gas from wells located on any tract included in the lease will be regarded during the life of the lease as production from each and all other tracts included therein.*" (Emphasis added.)

See also 1 R. Myers Pooling and Unitization secs. 3.01 through 3.03 (2d ed. 1967); L. Hoffman, Voluntary Pooling and Unitization (1954).

These agreements are found more frequently in oil and gas leases where the risks of drainage and wastes onto contiguous lands are greater, but similar provisions do appear in coal leases. (See G. Stroud, *Acquisition of Coal Rights—Its Different*, 21 Rocky Mtn. Min. L. Inst. 587, 600 1976).) There is, however, no language in the lease to support Zeigler's assertion that the entire bed of coal in the general area, known as the Murdock Mine,

was to be deemed a contiguous unit so that production on one or more parcels of land would satisfy the implied agreement to produce with respect to all of the other leased tracts, regardless of whether or not operations on the other tracts commenced within the primary period.

The only land described in the lease is the plaintiffs' tract. There are vague references to "block" and "vicinity," but the agreement has no language making rights and duties under the instrument depend upon mining operations on other tracts leased by Zeigler. Any want of explicitness of language is attributable to the defendant, unquestionably the drafter of the leasing instrument. We also observe that at the time the leasing agreement was executed the defendant's predecessor in interest had already sunk a mining shaft in a nearby tract of land and thus it appeared that production was imminent. If the parties had intended that removal of coal on other parcels extending over the coal of the Murdock Mines would satisfy production performance owed to the lessors, there would hardly be reason to have provided for a primary term of 25 years in the lease.

The next issue we consider is the question of the proper measure of damages. In addressing this we must first determine whether the trial court erred, as the defendant argues it did, in holding that the defendant was a bad-faith trespasser as a matter of law. The appellate court concluded that this question should have been submitted to the jury and entered a remittitur, it said, to avoid the necessity of remanding for a new trial. To distinguish here between a good- and bad-faith trespasser is important because of the bearing the difference in status has upon the amount of damages to which the plaintiffs are entitled.

When the trial court held that Zeigler was a bad-faith trespasser it had already determined as a matter of law that it was liable to the plaintiffs, based upon the court's earlier conclusion that the lease had expired by its own terms on June 20 1970. The next question for the court

was to decide the proper measure of damages. Courts have distinguished between innocent an wilful trespass as to damages recoverable. Broadly speaking, most jurisdictions hold that one who in good faith trespasses and converts the coal for his own use may set off certain operating expenses against the value of the coal converted, whereas a wilful trespasser may not and thus becomes liable for the coal at its market value. See Annot., 7 A.L.R. 908 (1920); Annot., 21 A.L.R.2d 380 (1952).

The refusal to allow these setoffs for labor and operational expenses has been held to be punitive in nature. (*See* 4 American Law of Mining sec. 21.10 (1979) and cases cited therein). Thus, while generally the measure of damages is a jury question, the issue of whether the circumstances in a particular case warrant the imposition of punitive damages is a question of law for the court. (*Kelsay* v. *Motorola, Inc.* (1978), 74 Ill. 2d 172, citing *Knierim* v. *Izzo* (1961), 22 Ill. 2d 73; *Queen* v. *Behm* (1978), 58 Ill. App. 3d 253.) The trial court here did not err in treating the question whether the defendant was a trespasser in good or bad faith as a question of law.

Further, the trial court was correct in its ruling that Zeigler was a wilful trespasser as a matter of law. The record shows that in 1971 the defendant was given actual notice that the Dethloffs were the new owners of the tract in question. Upon tendering the rental payment for 1971 to the plaintiffs it was informed by the Dethloffs that they considered the lease to have expired by its own terms on June 20, 1970, but they also expressed through their attorney a willingness to renegotiate the lease. This and other efforts to renegotiate the terms of a lease were rejected by the defendant. Mr. Dethloff later became aware that Zeigler was to commence operations in the fall of 1975 or later that spring, and he again wrote to the defendant stating that the lease had expired. After production had in fact begun in January of 1976 the plaintiff threatened suit unless operations were halted. Despite the fact that the Dethloffs filed their suit in June of 1976, five

months after Zeigler began removing coal from the plaintiffs' land, the defendant continued to mine until all of the coal in the tract had been removed in December of that year.

At no time did the company attempt to renegotiate the lease, nor did it seek a determination of the parties' rights under the lease by filing a declaratory judgment or other action. The only stated defense for the company's going ahead with mining operations despite its actual notice of the plaintiffs' interest in the land and their position that the lease had expired was a claimed reliance upon legal counsel's advice that the lease was still in effect. That claim on this record is unpersuasive. For example, it was clear to the defendant that a dispute had formally arisen as to its and the plaintiffs' rights. The lease provided that in the event of such a dispute the defendant, as the lessee, had authority to withhold payments of rents. Here the defendant did withhold on the ground that there was a dispute. Despite this acknowledgment of a dispute as to its rights, and in disregard of the plaintiffs' efforts to renegotiate, the defendant went ahead with its mining operations.

Considering our holding that the defendant was correctly judged a wilful trespasser the question next is whether the jury applied the proper measure of damages in awarding the plaintiffs $4,019,867.08. This amount was calculated by multiplying the value of the coal at the mouth of the mine, less lifting costs, by the total tonnage of coal and other materials removed from the plaintiffs' land between January and December of 1976. This formula, except for the erroneously included factor of "other materials," represents the measure of damages uniformly applied in coal conversion cases in Illinois prior to this court's ruling in *Lambach* v. *Town of Mason* (1944), 386 Ill. 41. Decisions prior to *Lambach* held that regardless of whether the defendant was an innocent or wilful trespasser the measure of damages was to be the value of the coal at the mouth of the mine, less the costs of conveyance or lifting to that site. See, *e.g., DeGrasse*

v. *H.W. Gossard Co.* (1908), 236 Ill. 73; *Donovan* v. *Consolidated Coal Co.* (1900), 187 Ill. 28; *Illinois & St. Louis Railroad & Coal Co.* v. *Ogle* (1879), 92 Ill. 353.

Relying primarily upon *Guffey* v. *Smith* (1915), 237 U.S. 101, 59 L. Ed. 856, 35 S. Ct. 526, this court, in *Lambach,* held for the first time that a good-faith trespasser should not be held to the same rule on damages as one who wilfully trespasses and converts. The court said that the defendant, who had mistakenly sunk an oil well on the plaintiff's land, should receive "credit for the reasonable cost and expenses of drilling, completing, equipping and operating the well and producing the oil which has been recovered therefrom, less the reasonable value of any of the equipment salvaged." (386 Ill. 41, 56.) *Lambach* involved a trespass in good faith and is not relevant here. The court, in a *dictum,* referred to decisions prohibiting relief to bad-faith trespassers, but we need not here consider the reach of the *dictum.* The rule that, prior to *Lambach,* was applied to both innocent and wilful trespassers was applicable here to the bad-faith trespasser, that is, the measure of damages was the value of the coal at the mouth of the mine, less the lifting costs from the coal bed to that location. In other words, the only production expenses allowed the bad-faith trespasser as an offset are the expenses of conveying or "lifting" the mined coal to the mouth of the mine. The other costs of production, such as of drilling and processing the coal, must be borne by the trespasser.

As we stated, the multiplier figure used for the total amount of coal mined erroneously represented not only the coal which was actually sold but also other materials, such as slag, which had no value and were not marketed for sale. The plaintiff would have been entitled to royalty payments only for coal actually sold, and the nonsaleable materials should have been excluded. Of the 238,426 tons of material removed, the record shows that the amount of marketable coal was 215,247.40 tons. Upon recalculation from the evidence in the record, the correct

measure of damages was the market value of the coal at the mouth of the mine, *i.e.*, the value received upon sale, at $17.91 per ton, minus lifting costs of $1.05 per ton multiplied by 215,247.40 tons of coal sold, or $3,629,070.12. There is no dispute between the parties as to the figures used in these calculations.

The defendant contends that this measure of damages or compensatory formula for landowners is archaic and does not reflect economic reality. The defendant in effect would have us eliminate the distinction drawn between innocent and wilful trespassers so far as recoverable damages are concerned. We consider that the elimination of this distinction would be unsound. The rationale of refusing to allow a wilful trespasser to deduct costs of production when damages are being assessed is, of course, to discourage misconduct of that character. Courts have considered that the discouragement of these trespasses calls for what amounts to awards for punitive damages. As the court in *Athens & Pomeroy Coal & Land Co.* v. *Tracy* (1925), 22 Ohio App. 21, 33-34, 153 N.E. 240, 244, *aff'd* (1926), 115 Ohio St. 298, 152 N.E. 64, observed:

> "The difference in the measure of damages allowed for an innocent and a wilful conversion lies in public policy. As a strict matter of right *inter partes*, the just claims of one wronged by an unlawful conversion of his goods are satisfied when such owner is fully compensated therefor. If the owner, however, were to be limited to compensation, there would be no inducement for the * * * conversioner to refrain from the trespass. * * * [This principle] is nothing more or less than the application of a fixed rule for exemplary damages imposed as a matter of public policy."

It is this rationale that causes us to reject the defendant's proposal that damages should be awarded the plaintiffs according to the royalty method of valuation. Under this formulation the plaintiffs would be entitled to a

royalty payment of $.15 per ton, which represents, the defendant says, the current price being paid in the area by coal companies in leasing agreements. The Dethloffs' total compensation or damages according to this standard would be $32,287.11. To apply this artificial standard arbitrarily would obviously allow the defendant to profit by its own wrongdoing. We observe that decisions where this measure was applied involved innocent and not bad-faith trespassers. See, *e.g.*, *McIntosh* v. *Ropp* (1912), 233 Pa. 497, 82 A. 949; *New Domain Oil & Gas Co.* v. *McKinney* (1920), 188 Ky. 183, 221 S.W. 245.

There is no merit to the defendant's contention that the plaintiffs were estopped from bringing their action because they failed to take any steps to prevent the defendant from commencing operations. The Dethloffs' cause of action for trespass and conversion did not arise until January of 1976, when production operations began. Suit was brought five months later. The fact that Zeigler tendered a rental payment in October of 1971 did not require the plaintiffs to file suit, nor did this attempted payment mean that mining operations were imminent, which operations in fact did not begin until more than four years later. Too, the contention that the plaintiffs' acceptance of checks representing royalty payments effected an accord and satisfaction does not persuade. None of the checks were cashed; they were retained in a safety deposit box by the plaintiffs only as evidence of the total number of tons of coal mined.

Also without substance is the defendant's claim that the trial court's denial of its motion for a change of venue was improper. The motion was presented when the court had already held in favor of the plaintiffs' on count III, ruling that the lease had expired by its own terms. Since the trial court had ruled on a substantial issue prior to the motion, its denial was proper. *See Gilliland* v. *Board of Education* (1977), 67 Ill. 2d 143; Ill. Rev. Stat. 1979, ch. 110, par. 503.

Turning to a contention of the plaintiffs, we hold that the trial court was correct in denying their claim that punitive damages were warranted. As we have observed above, the harsh rule on damages applicable to a wilful trespasser and converter of coal is by its very nature punitive. The plaintiffs were awarded damages far beyond what they would have received through royalty payments, and the defendant should not be liable for what would be in effect punitive damages upon punitive damages.

Under the disposition we make it will not be necessary for us to consider the propriety of the appellate court's use of the remittitur. See Ill. Rev. Stat. 1979, ch. 110A, par. 366; see generally C. McCormick, Damages, ch. 2, sec. 19 (1935).

For the reasons given, the judgments of the appellate and circuit courts are affirmed as to liability and reversed as to damages. The cause is remanded to the circuit court of Douglas County with directions to amend its judgment to reflect damages in the amount of $3,629,070.12.

Appellate court affirmed in part and reversed in part; circuit court affirmed in part and reversed in part; cause remanded, with directions.

MR. JUSTICE CLARK took no part in the consideration or decision of this case.

MR. JUSTICE UNDERWOOD, concurring in part and dissenting in part:

I agree that the lease had terminated. In my opinion, however, the appellate court correctly held the trial court should have submitted to the jury the question whether defendant was a good- or bad-faith trespasser. The company had not acted completely arbitrarily in proceeding to mine the coal; it had consulted both its house counsel and independent counsel, and both had advised that the lease was still in effect; defendant apparently knew that

similar suits against it by other plaintiffs in the same county had been dismissed by the plaintiffs; and the company had reached the point in its mining operations where it either had to mine plaintiff's coal or permanently bypass it. In these circumstances, I simply cannot say that defendant's bad faith has been so conclusively demonstrated that the issue should have been taken from the jury.

I agree, too, with the remedy fashioned by the appellate court in the form of a remittitur in lieu of a new trial. That remittitur left plaintiffs with a judgment for the total profit realized by the company and was in an amount approximately 50 times greater than the new lease, which plaintiffs were apparently willing to negotiate, would have produced.

MR. JUSTICE RYAN joins in this partial concurrence and partial dissent.

APPENDIX C

(ORDER OF THE SUPREME COURT OF ILLINOIS DENYING REHEARING)

ILLINOIS SUPREME COURT
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SUPREME COURT BUILDING
Springfield, Ill. 62706
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November 26, 1980

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Nos. 51950-51953 Cons.

Phillip A. Dethloff, et al., appellants, vs. Zeigler Coal Company, an Illinois Corporation, appellee. Appeal, Appellate Court, Fourth District.

The Supreme Court today denied the petition for rehearing in the above entitled cause. Mr. Justice Clark took no part.

Very truly yours,
/s/ Clell L. Woods
Clerk of the Supreme Court